



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1966



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The Commonwealth of Massachusetts

BOSTON, DECEMBER 7, 1966.

To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1966.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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⁵ Appointed, January 2, 1966

⁶ Appointed, January 3, 1966

⁷ Resigned, January 14, 1966

⁸ Resigned, February 11, 1966

⁹ Resigned, February 18, 1966

¹⁰ Appointed, February 24, 1966

¹¹ Appointed, February 14, 1966

¹² Appointed, February 21, 1966

¹³ Resigned, March 1, 1966

¹⁴ Resigned, March 2, 1966

¹⁵ Appointed, March 9, 1966

¹⁶ Appointed, March 21, 1966

¹⁷ Appointed, April 4, 1966

¹⁸ Resigned, April 8, 1966

¹⁹ Appointed, May 2, 1966

²⁰ Appointed, May 9, 1966

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

for the period July 1, 1965 — June 30, 1966

Appropriations

Attorney General's Salary	\$ 22,500.00
Administration, Personal Services and Expenses	788,094.00
Veterans' Legal Assistance	18,600.00
Claims, Damages by State Owned Cars	100,000.00
Moral Claims	8,000.00
Capital Outlay Program, Equipment	6,197.23
Total	<u>\$943,391.23</u>

Expenditures

Attorney General's Salary	\$ 22,480.10
Administration, Personal Services and Expenses	787,039.80
Veterans' Legal Assistance	18,580.35
Claims, Damages by State Owned Cars	100,000.00
Moral Claims	8,000.00
Capital Outlay Program	4,714.12
Total	<u>\$940,814.37</u>

Income

Fees — Filing Reports — Charitable Organizations	\$ 13,049.00
Fees — Registration — Charitable Organizations	3,690.00
Fees — Professional Fund Raising Counsel	120.00
Miscellaneous	459.06
Total	<u>\$ 17,318.06</u>

Financial statement verified (under requirements of C. 7, S 19 GL), November 22, 1966.

By JOSEPH T. O'SHEA,
For the Comptroller

Approved for publishing.

M. JOSEPH STACEY,
Comptroller

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL
Boston, December 7, 1966

To the Honorable Senate and House of Representatives:

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1965, totaling 31,717, are tabulated as follows:

Extradition and interstate rendition	209
Land Court petitions	158
Land Damage cases arising from the taking of land:	
Department of Public Works	2,176
Metropolitan District Commission	151
Government Center Commission	6
Department of Mental Health	1
Department of Natural Resources	28
Department of Public Safety	1
Department of Public Utilities	2
Massachusetts Maritime Academy	1
Salem Teachers College	1
Southeastern Massachusetts Technological Institute	9
University of Massachusetts	17
Miscellaneous cases, including suits for the collection of money due the Commonwealth	15,535
Estates involving application of funds given to public charities	3,012
Settlement of cases for support of persons in State institutions	2,276
Small Claims against the Commonwealth	322
Workmen's compensation cases, first reports	6,453
Cases in behalf of Division of Employment Security	603
Cases in behalf of Veterans' Division	753

Introduction

This, my fourth Annual Report as Attorney General of the Commonwealth of Massachusetts, pursuant to G. L. c. 30, § 32, covers fiscal 1966—the period July 1, 1965 through June 30, 1966.

The work load of the Department of the Attorney General has continued to increase during fiscal 1966. The organization of the Department's legal staff into divisions has proven highly effective in proving expertise in the conduct of the legal affairs of the Commonwealth. It has enabled the Department to handle its increased case load efficiently and effectively.

During the year the Department presented a substantial amount of proposed legislation to the General Court for its consideration. A list of bills proposed for the legislative year 1966 appears as "Exhibit A."

Administrative Division

The Administrative Division renders legal services of a wide and varied nature. Members of this Division are called on to represent constitutional officers and state agencies in civil litigation in almost every court of the Commonwealth, the United States District Courts, the United States Court of Appeals, and the United States Supreme Court. In addition the Division issues opinions to the constitutional officers and state agencies, renders opinions under the Conflict of Interest Law, G. L. c. 268A, advises the Governor on the constitutionality of pending legislation, and approves town by-laws.

As the size and complexity of state government continues to increase, the need for more opinions of the Attorney General also increases.

The following is a summary of the most important opinions issued by the Division during the past fiscal year.

In response to inquiries of the Governor regarding the constitutionality of certain proposed legislation, which provided that each school day be opened with a period of silent meditation, the Attorney General made the following ruling. A 1963 opinion states that the practice of daily reading of the Bible in our schools, pursuant to Massachusetts statute, was in violation of the United States Constitution. This opinion was confirmed in the cases of *Attorney General v. School Committee of North Brookfield*, and *Waite v. School Committee of Newton*. The Attorney General was of the opinion, however, that this act, providing for "silent meditation," was not unconstitutional as "silent meditation" did not necessarily have the characteristics of a "prayer." Upon the issuance of the opinion the Governor approved the act which became G. L. c. 71, § 1A.

In another request the Governor asked an opinion of our office regarding the constitutionality of an act providing for the elimination of racial imbalance in the public schools. The original act established an Advisory Committee on Racial Imbalance and stipulated that no individual who has been listed as a member of a communist front organization in any state or federal document, shall be appointed to this Committee. It was the opinion of the Attorney General that this particular provision was in constitutional conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. However, it was his further opinion that the remaining portions of the act were constitutional. The Governor thereupon approved the bill. Massachusetts became the first state to pass such legislation.

Two *in rem* suits have been instituted by the Division against John Cleland's *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*) and William Burrough's *Naked Lunch*. In 1964 the Superior Court

ruled that *Memoirs of a Woman of Pleasure* was obscene. Early in 1965 it was argued before the Supreme Judicial Court, Full Bench, which in a four to three decision, upheld the ruling that the book is obscene. The publisher then claimed an appeal to the U. S. Supreme Court. In the 1966 case *Memoirs v. Massachusetts*, the United States Supreme Court by a 6-3 Decision ruled that the book in question was not obscene.

Similarly, in the case *Attorney General v. A Book Named Naked Lunch*, the trial judge sitting in Suffolk Superior Court declared the book obscene. On appeal by the publishers to the Supreme Judicial Court, the Court in 1966 ruled that the book was not obscene. See 1966 Adv. Sh. 1177.

At the request of the Governor the Division represented the Commonwealth in proceedings relating to the financially distressed New Haven Railroad. The Commonwealth's position has been defended successfully against the claims of creditors who seek to have the railroad liquidated in the Federal Bankruptcy Court in New Haven. The Division was instrumental in preventing the discontinuance of all passenger service as urged before the Interstate Commerce Commission by the railroad's creditors. It also urged that the Interstate Commerce Commission issue an order including the New Haven Railroad merger. Efforts continue in a variety of judicial and administrative proceedings to find a financially stable solution for the New Haven at the earliest possible date.

The Division successfully defended the Commissioner of Commerce and Development in a suit questioning the constitutionality of G. L. c. 30, § 59 (the "Perry Law"). This law provided for summary suspension of state employees who are indicted for action constituting misconduct while in office. The Supreme Judicial Court rejected the argument of the plaintiff that the act constituted an unconstitutional impairment of his contractual rights. It pointed out that contract rights are always subject to be frustrated by the proper exercise of the police power.

The cases just cited are only a small portion of the litigation handled by the Division during this period. Many of these cases have involved questions of broad public impact. Generally, the largest amount of man hours spent in litigation concern specific problems of individuals in their dealings with the state agencies. While assuming the role of advocate for these agencies, the Department remains mindful of the rights of these individuals. Agencies which require the most frequent court representation are the Civil Service Commission, the Alcoholic Beverages Control Commission, the Department of Public Utilities and the Board of Registration in Pharmacy.

During this period, members of the Administrative Division formed a committee to submit to the Attorney General a report concerning the adoption of rules by agencies under the State Administrative Procedure

Act, G. L. c. 30A. Since the passage of the Administrative Procedure Act in 1954, there has been varying compliance by the state agencies with the requirement pertaining to adoption of rules governing their own procedure under section 9 of the Act. This condition illustrated the need for a uniform set of rules to be used by all agencies. The Committee's report contained uniform rules for use in adjudicatory proceedings and adopting regulations. The rules were printed in pamphlet form and distributed to all agencies in March, 1966. The committee conducted several seminars to explain the contents of the pamphlet and to encourage the adoption of the rules as tailored to meet the agencies' needs.

Civil Rights and Liberties Division

The Civil Rights and Liberties Division continues to assist other state officials in the securing of the constitutional rights of all the Commonwealth's citizens.

The following summary outlines the sensitive and often difficult issues that confront the members of this Division.

In the 1963 report, the procedure for prosecuting allegedly obscene books formulated at a conference with the District Attorneys was discussed. It was agreed that enforcement of obscenity laws regarding books would be handled by civil proceedings against the books through the Attorney General's Office rather than by criminal proceedings against the seller. In the summer of 1965, it was called to our attention that six cases were pending against book sellers in courts throughout the Commonwealth. To eliminate methods of prosecution which the county prosecutors already had agreed were sporadic and unfair, the Attorney General "nol prossed" these actions.

Soon after the passage of the Federal Voting Rights Act of 1965, the state of South Carolina challenged the constitutionality of the Act in the U. S. Supreme Court in the case of *South Carolina vs. Katzenback*. Because the issue affected state requirements for voting, the Solicitor General requested the states to submit *amicus* briefs and to present arguments during the hearing on this suit. Our Department submitted an *amicus* brief and took the leadership in soliciting the Attorneys General of the other states to submit briefs, also. A total of eighteen states joined. Former Solicitor General Archibald Cox was appointed a Special Assistant Attorney General to join with the chief of this Division in presenting arguments for the Commonwealth and the other states. The unconstitutionality of the act was upheld.

During the summer of 1965 allegations of police malpractices, growing out of arrests of a number of Negroes for alleged disorder, brought on a series of demonstrations on the steps of city hall in Springfield.

As the tension increased members of this Division moved to the Springfield office to investigate and to make the presence of the Attorney General's Office felt in the community in whatever way possible. Amidst charges of bad faith on both sides and a call for the National Guard at the request of the city officials, a march was held without incident. The Police Commissioner of Springfield held hearings on the charges of police malpractice, subsequently dismissing them all. Although open hostility ceased, the results of the tensions generated were in evidence in the community for some time thereafter.

One of the responsibilities of this Division is to represent the Massachusetts Commission Against Discrimination (MCAD), an agency responsible for administering the Fair Practices Statutes. During the period covered by this report, the Commission was involved in several areas of litigation, the results of which may greatly enhance the effectiveness of the Commission's work. During this period the Commission litigated 23 matters. The most important of these follow.

A complaint was brought against a respondent real estate broker who allegedly discriminated in housing because of race. The Commission therefore brought an action for contempt of an order of the Superior Court to cease and desist, the order having been entered on the basis of a previous complaint.

The court found discrimination on the facts but declined to rule the broker in contempt, as a matter of law, because the act was committed by an agent. The Commission appealed to the Supreme Judicial Court on this question. Should the Court decide that an individual cannot be held in contempt for his agent's act in these cases, legislation will be necessary to deal with such repeat offenders.

In another housing case, *MCAD v. Flynn*, the Commission ordered the respondent real estate broker to place in each of his newspaper advertisements for a period of six months, or the next twenty-six advertisements, the language "equal opportunity listing." This order was upheld by the Superior Court.

Another housing case currently on appeal to the Supreme Judicial Court involves the question whether the facts must show that a complainant was born outside the U. S. in order for the Commission to find discrimination on the ground of national origin. Our fair practices statutes sometimes use the term "national origin" and at other times "national ancestry," often both. It is our contention that in these statutes the terms are used interchangeably.

During this period, the Fair Practices Statutes were amended to prohibit discrimination because of sex. As a result, over fifty banquet waitresses, members of a union of catering waitresses, filed a complaint against a union whose membership was restricted to banquet waiters,

asking for full membership rights within that union. After protracted hearings, the matter was settled by an agreement which merged banquet waiters and banquet waitresses into the same union with equal rights.

The Secretary of State requested an opinion on terminology used in G. L. c. 46, § 1, which states that a person's skin color must be recorded on all records of vital statistics. The Secretary was advised that although the term "color" is imprecise, the state's interest in record-keeping could not be at the expense of an individual's right to be described in a fair and reasonable manner. Accordingly, reasonable racial designation and reasonable designation of skin color both comply with the statute and must be accepted.

Contracts Division

The activities of the Contracts Division include the trial of highway and building construction cases; the approval of public contracts, bonds and leases; and legal research, preparation of briefs, memoranda and opinions on various contract problems. In addition the Division confers with officials from over 80 state agencies, advising them on the preparation and drafting of contracts and leases affecting their departments. Generally, such early guidance procedures prevent later litigation from developing.

The Division has processed approximately 1800 contracts and leases for the Commonwealth during this fiscal year. Each document must be thoroughly considered and approved in order that the Commonwealth's business may continue without interruption.

During the course of the year the Division reviewed about 150 claims of sub-contractors to determine if the various departments may make direct payments against funds retained by the Commonwealth under G. L. c. 30, § 39F, or whether payment must be deferred until hearings are held.

The Division continues its assignment of reviewing the form of all documents prepared in connection with note issues, and notice of sale of bonds under financial assistance housing programs for elderly persons and veterans of low income. Written approvals are issued if the review reveals that the form is in proper order. Files are maintained on the changes in membership of all the local housing authorities. Advisory opinions have been prepared, informal conferences held, and forms developed to effect expeditious handling of the contracts stemming from the Commonwealth's housing program. Some 50 to 60 note issues come in each quarter, involving an average of 50 million dollars per quarter. In the last quarter, 57 housing authority contracts involving \$48,224,000 in financial assistance loans were reviewed and approved.

The Division also grants technical assistance and legal advice to state

agencies on various matters requiring informal opinions. Following is a summary of some of the more important subjects which required either technical assistance or research in the preparation of memoranda by this Division.

1. To the Department of Public Works concerning the publication of the number and names of contractors who have taken out plans and specifications prior to bidding;
2. To the Purchasing Department relative to omissions in bid information inquiries;
3. To the Sergeant-at-Arms about the source of his authority to enter into a proposed contract;
4. To the Bureau of Building Construction concerning whether it could enter into a settlement of a claim;
5. To the Bureau of Building Construction concerning alleged price and bidding discrimination in washer-extractor bids. The Commissioner of Administration and Finance undertook an investigation of the matter;
6. Medfield State Hospital—litigation was avoided by bringing the parties together and obtaining the contractor's assent to replace defective flooring in the hospital wing.

Litigation in the Division has been handled by three of the five attorneys who have devoted most of their time to trial work each week. The Division handled about 200 cases during this fiscal year, four of which are at some stage of appellate proceedings. The Division has obtained final action favorable to the Commonwealth before trial in approximately 130 cases since June, 1965. This was done through special pleadings which necessitated conferences, the drafting of pleadings, and preparation of briefs in support of motions and oral arguments by the trial attorneys. Some twenty trials before Auditors have been attended by staff members since June, also. The trials average two to four weeks and the matters in issue have been principally on the subject of extra work, delays, and allegedly arbitrary and capricious conduct on the part of the Commonwealth's agents. The Division has already been obliged to respond in two cases to depositions under new Rule 15 for oral discovery.

A case of particular significance, which became a major victory for the Commonwealth, involved the construction of a 2 mile stretch of highway in Greenfield and Bernardston at a cost of more than \$2,000,000. At issue was the contractor's responsibility for inspecting the site prior to submission of bids and the reliance that could be placed on the quantity estimates and proposal furnished by the Commonwealth. The language of the decision by the Supreme Judicial Court, which reinforced the existing law (namely that parties are bound by the provisions in such a

contract), should prove invaluable to the defense of future construction cases involving representation of conditions existing at a job site.

Another case decided in the Commonwealth's favor determined that the statute of limitations begins to run in a contract case not later than the date of the semi-final estimate. This was a major victory for the Division, resulting in a saving of \$1,100,000.

Several major cases involving large sums of money have been tried by the Division since 1965. In many instances they are still in litigation and, in view of the amounts involved, will undoubtedly be subject to appellate proceedings.

Because of the volume and complexity of its cases, the Division has initiated a program of periodically reviewing all pending files. Analysis sheets containing the current status of each case is prepared. Where possible, cases are closed. As a result of the most recent review, fifty-nine files were closed because they were deemed inactive under Rule 85, or because parties assented to dismiss the Commonwealth as a party or discontinue the action altogether.

Despite an increase in cases this past year, the Division has continued to carry on its litigation work at a rapid pace. The Administration's policy of "no settlement" has prevailed and disputed contract claims continue to be settled in court.

Criminal Division

In order to wage an effective attack against the forces of organized crime, the Criminal Division staff has been increased. Several investigators and Special Assistant Attorneys General have been added to the staff to help handle the voluminous workload of that Division.

The Small Loans Case, initiated by this Administration in January of 1964, continues to await trial. Hundreds of motions have been filed and many of them were argued by an Assistant Attorney General from this Division. Several motions remain to be heard before the case is finally tried.

One problem which gained some notoriety was the extent of the illegal practice of dentistry throughout the Commonwealth. A great number of dental technicians were engaged in the practice of making dentures without a written prescription from a registered dentist. This practice resulted in injury to some of the citizens of the Commonwealth. Members of the Criminal Division worked closely with the Massachusetts Dental Society in an attempt to end these illegal practices. More than fifty persons were successfully prosecuted throughout the state. As a result of these prosecutions, the illegal practice of dentistry has been reduced to a bare minimum.

Three members and a former member of the Executive Council were

tried on conspiracy and bribery charges. In two other cases involving public officials, the parties were found guilty and sentenced to a term in the House of Correction.

The number of extraordinary writs [writs of error, habeas corpus, mandamus, declaratory judgments, etc.] continues to increase. With each new decision handed down by the Supreme Court of the United States concerning constitutional rights, a different writ was filed usually by the same prisoner. However, the Criminal Division has been remarkably successful in opposing these writs. To handle this great volume of writs it has been necessary for Assistant Attorneys General in this Division to spend long hours in the library and many hours in court.

The special section for complaints has handled well over 3000 cases during this past fiscal year. Headed by an Assistant Attorney General, the section meticulously processes each complaint. Often the complainant need only be directed to another source for assistance, while at other times extensive research is carried on.

The Criminal Division continues to work very closely with all law enforcement officials. Memoranda concerning the effect of decisions of the Supreme Court on law enforcement are sent out periodically. In addition, an Assistant Attorney General lectures at the various police schools throughout the Commonwealth.

The Division is striving to increase the cooperation between all law enforcement agencies and propose statutory provisions which will assist in the effort directed toward stemming the rising tide of crime.

Eminent Domain Division

The work of the Eminent Domain Division involves the legal procedures by which a private citizen's real estate may be taken by a public body for public use. The citizen is entitled to compensation for the fair value of the land taken and, if only part of his land is taken, to compensation for the resulting diminution in value of the balance.

Under new legislation enacted in 1964 and proposed by this Administration, the taking agency, before making or recording the order to take, must have in its files an appraisal of the damage by a competent and qualified expert. With that appraisal in hand it then awards and notifies the property owner that it is ready to pay the full value of the damage, including the value of the part taken and any diminution in value to the remainder. If the property owner is not satisfied with this award, he may file a petition in the Superior Court for the assessment of his damages with a right to jury trial. The representation of the interests of the Commonwealth in this petition becomes the responsibility of the Eminent Domain Division.

The landmark achievement of the Division during this fiscal year has been the completion of a three-year study by the Highway Laws Study Commission, which has resulted in a new Highway Code (S. 885 of 1966) for the consideration of the Legislature. The Code is a compilation of our highway laws stated in an organized fashion, not separated into many parts as in the existing law. This effort is the first successful attempt in 50 years to codify these laws.

The Division has also published two manuals to assist lawyers and appraisers for the State in carrying out their duties. The **MANUAL OF MASSACHUSETTS EMINENT DOMAIN APPRAISAL LAW** is a compendium of the most frequently used Massachusetts laws in eminent domain. The **MANUAL OF THE PROCEDURES IN THE EMINENT DOMAIN DIVISION** has been prepared at the request of the United States Bureau of Public Roads.

The Division has worked constantly throughout this fiscal year to reduce the backlog of eminent domain cases in the courts. By the end of the first quarter, the Division had 837 cases. This figure rose to 971 by the end of 1965. But at the close of the fiscal year in June 1966, the Division had reduced the backlog to 711. This backlog consists mainly of current cases which have not yet reached their chronological turn on the court trial lists.

Several members of the staff devote a large portion of their time to the reduction of this backlog. When the Division is ready for trial, each case is carefully analyzed, outside settlement authority and trial counsel are assigned, and an effort is made to expedite each case. When the Commonwealth and the petitioner are not far apart on their figures, the Division tries to promote an amicable settlement.

Now that the Federal Government shares in the cost of most of our highway land takings, the Division works continually to meet the high standards of documentation required by Federal officials. Due to these requirements a special burden is placed upon our trial counsel and records keeping staff so that no claim of the Commonwealth for any Federal payment will be jeopardized.

When necessary the Division meets with officials of the Department of Public Works and of the United States Bureau of Public Roads to make certain that all reasonable requirements of both agencies are being met. Much time is spent by our personnel giving advice and help to the many other State agencies which have land-taking powers. The Division, in many instances, prepares and helps to file the taking orders and negotiates settlements. When all other means fail, the Division defends the Department of Public Works in Court.

The Division also defends the Commonwealth's interests in all petitions filed in the Land Court for registration of land which borders on or

affects public rights. The number of such cases in any given year averages close to 300. Some of these matters are tried out to a judicial conclusion; others are amicably agreed upon and the rights of the Commonwealth are protected by stipulation. All indications are that a heavy load of eminent domain cases will continue for several years. The Commonwealth has benefited greatly from a saving of interest payments due to rapid disposition of cases, and the practice of more thorough preparation procedures has brought about more favorable verdicts.

Employment Security Division

The Employment Security Division works closely with the Massachusetts Division of Employment Security. The work of its staff involves the prosecution of delinquent employers and fraudulent compensation claimants resulting in the recovery of significant sums of money for the Commonwealth, which otherwise would not have been recovered.

During this fiscal year members of the Employment Security Division waged an energetic and forceful program in handling all cases referred to its Division for criminal prosecution. At the same time, the Division has followed a policy of giving the erring individual, the corporation or the business entity, every opportunity to make payment before prosecution actually begins. Usually two or three letters of warning coupled with scheduled office conferences held with the principals involved, afford the offender every possible opportunity either to make restitution or to otherwise explain his side of the case. In the past, employers have had a more lax and casual attitude toward paying state taxes and claimants have looked upon the Unemployment Compensation Fund as a means to supplement their weekly earnings when necessary with no fear of retribution. It is hoped that with our diligent prosecution of these offenders, employers will take a more serious attitude toward their state taxes, and the claimants halted in their attempts to defraud State agencies.

During the fiscal year, 603 cases were handled by this Division. Of these, 445 cases remained from the previous year, while 158 cases, involving matters of both employer taxes and fraudulent claims, were referred to the Division for investigation and prosecution. A total of \$95,221.90 was collected from employment tax cases and \$49,257.80 collected on fraudulent claims cases. Total monies recovered for the Commonwealth amounted to \$144,477.69.

By the end of the fiscal year the Division closed 232 of the 603 cases. Of this number 114 were employment tax cases and 115 fraudulent claims cases. A balance of 371 cases was left, 74 less than those remaining open from the previous year.

At the beginning of the fiscal period, there were no cases pending in

the Supreme Judicial Court. During the year, five cases were entered. Members of our staff argued three cases in behalf of the Director of the Division of Employment Security, in which the Supreme Judicial Court issued favorable decisions, in two, setting aside the decision in one. Two cases were pending in the Supreme Judicial Court at the end of the fiscal year.

Finance Division

The Finance Division is responsible for rendering legal assistance, usually at the appellate level, to the Department of Corporations and Taxation, the Division of Insurance, the Division of Banking and the Office of the Treasurer and Receiver General. In accordance with statutory provisions, a member of this Division sits on the Contributory Retirement Appeal Board and is currently serving as chairman, in addition to representing the Board in all litigation. Among the Board's "clients" are the State Retirement Board and the Teachers Retirement Board.

The following is a summation of the more important cases argued by this Division in behalf of the above agencies.

Shinnecock, Inc. v. State Tax Commission—held that the taxable interest of a taxpayer in a ship is its cost less depreciation and the balance of a valid mortgage obligation.

Cochrane v. State Tax Commission—held that benefits to a widow from a private pension plan were taxable under the inheritance statutes, whereas benefits from a government pension plan were not.

Massachusetts Hospital Service, Inc. v. Commissioner of Administration—This case involved the validity of the contract between Blue Cross and the participating hospitals. The agreement, approved by then Commissioner Waldron on December 31, 1964, provided for reimbursement for hospital services performed for Blue Cross subscribers. Since my last report (see 1965 Annual Report) all parties have agreed on a statement of facts. All briefs have been filed and arguments were presented to the Full Bench of the Superior Judicial Court on May 3, 1966.

Arkwright Mutual Insurance Co. v. Commissioner of Insurance—The Supreme Judicial Court ruled in favor of Arkwright reversing the decision of the Commissioner regarding the term "profits." As used in G. L. c. 175, § 80, "profits" does not include unrealized appreciation in the market of stocks. If the decision is upheld, millions of dollars of accumulated surpluses would be freed for investment in the stock market. The Commissioner requested an appeal of the decision in April, 1966.

Harding v. Commissioner of Insurance—Under ordinary circumstances this office takes the position that when a claimant is found to be entitled to a retirement benefit, the only function of the Insurance Commissioner is to compute the amount of the benefit. But in this particular case there was a flagrant disregard of the law by a local board, which compelled this Division to defend the position of the Commissioner in denying the claim. The Division was successful in its defense and the decision will prevent further abuse of the statutory requirement by local retirement boards.

Tufts v. Commissioner of Banks—Involves a petition for a writ of mandamus challenging the ruling of an administrative board which permits savings banks to make loans to one person of \$1500 by its savings bank department and \$1500 by its insurance department. The petitioners allege that the General Laws allow the corporation to make only one loan of \$1500 to a person. This office filed an appeal on the matter to the Supreme Judicial Court. The Court entered a rescript opinion ordering the petition dismissed because of the enactment of c. 810, Acts of 1965, which rendered the case moot. A final decree dismissing the matter was entered April 6, 1966.

During this fiscal year over one hundred fifty appeals were heard before the Contributory Retirement Appeal Board. A majority of the decisions are written by a member of this Division. The Division deserves much credit for shortening the waiting period between the time of filing the appeal and date of hearing, from a year and a half to 30 days in many instances. This desirable result has been brought about through "show cause" hearings to eliminate appeals which had little or no merit. Consequently, the Board was permitted to consider more fully those appeals with merit.

In addition to its involvement in litigation, the Division also renders assistance to other divisions in the Department when research is required to draft formal opinions. Also within its sphere of responsibility are the rendering of informal advice and opinions, almost daily, to private citizens, in a myriad of situations pertinent to its area of activity.

Industrial Accidents Division

The Industrial Accidents Division is chiefly concerned with representing the Commonwealth in workmen's compensation cases affecting state employees. Under the provisions of G. L. c. 152, § 69A, all payments of compensation benefits and disbursements for related medical and hospital expenses by the Commonwealth require the approval of the Attorney General. In all contested matters involving such claims, this Division appears for the Commonwealth before the Industrial Accident Board and in the courts when appeals are taken.

During this fiscal year a total of 6455 accident reports were filed on state employees' claims. Most of these were of a nondisability type requiring the Division's approval for incurred medical bills. The Division approved 1042 disability claims for the payment of compensation benefits. The prompt approval of all proper claims avoids much unnecessary litigation on claims which should be adjusted at their inception. It thus allows more time for the trial of those cases which warrant litigation.

Total payments made by the Commonwealth on state employees' claims pursuant to G. L. c. 152, § 69A, including disbursements through voluntary agreements, Board decisions and lump sum settlements, for this past fiscal year:

Industrial Accident Board (General Appropriation):

Incapacity Compensation	\$1,118,705.09
Hospital Costs, drugs et. al.	205,242.79
Doctor, Nurses et. al.	185,061.95
	<hr/>
	\$1,509,009.83

Metropolitan District Commission:

Incapacity Compensation	\$120,588.18
Hospital and Medical Costs	43,142.17
	<hr/>
	\$163,730.35

Total—All Disbursements

Incapacity Compensation	\$1,239,293.27
Hospital and Medical Costs	433,446.91
	<hr/>
	\$1,672,740.18

The Division approved voluntary payment in 123 more disability cases than in the prior fiscal year. The total increase in expenditures on such claims in this fiscal year period over the prior year, was only \$35,132.54. Significance of this slight rise becomes clearer when you take into account the 10% increase of the maximum weekly compensation payment for temporary total disability under § 34 of c. 152, which became effective in November, 1965. The hospital rate schedules on such cases continued to show a rise, also. The comparative statistics for the fiscal years 1965 and 1966, with the increase in payment of current claims, reflect a downward trend in the backlog of older cases. This relative leveling of costs has been made possible with the continued cooperation of the Industrial Accident Board through its chairman and the Director of the Public Employees' Section.

Health, Education and Welfare Division

The Division of Health, Education and Welfare is directly responsible for giving legal advice to four major departments of the Commonwealth: Public Health, Mental Health, Education and Public Welfare.

The legal problems referred to the Division are as varied and complex as the many statutes presently administered by these departments.

Health, Education and Welfare is proud of its participation in the first oral deposition taken in the Commonwealth under Rule 15 of the Rules of the Supreme Judicial Court.

By designation of the Attorney General, the chief of the Division sits on the Records Conservation Board and the Records Study Commission created by chapter 42 of the Resolves of 1966. The Division also participated in the Mental Retardation Planning Project and is counsel to the Board of Higher Education. The attorney assigned to a board is required to make a constructive contribution at the Board's regular meetings and must be knowledgeable with respect to the procedures for holding and conducting administrative meetings.

Litigation consumes most of the Division's time. Nearly 300 cases are presently pending, a good portion involving judicial review pursuant to G. L. c. 30A. A summation of pending litigation follows:

1. *Rate Cases*:—The Industrial Accident Board, the Rate Setting Board for Convalescent and Nursing Homes, the Department of Public Welfare, and the Commissioner of Administration all set rates. The cases were tried and settled during the prior quarter. The Board has set inpatient rates in accordance with agreement but has, as yet, not set outpatient rates.

A series of cases involving outpatient rates set by the Department of Public Welfare was scheduled for trial but counsel for the petitioner has indicated that the suits will be settled when new rates are issued.

A suit against the Rate Setting Board is pending in the Superior Court. The establishment of the 1967 rates may well end this case.

The hospital rate cases brought during the controversy over the establishment of the 1965 public assistance rates are still pending. Three of these cases have been successfully tried. The Court's decision is presently on appeal to the Supreme Judicial Court.

2. *Institutional Licensing*:—The Department of Public Health licenses nursing homes and hospitals. By refusing to grant a new license or to renew an outstanding license, the department enforces compliance with safety and health regulations. At least nine cases are presently pending in this area.

3. *Prevention of Unsanitary Conditions*:—The Supreme Judicial Court's decision in the Tewksbury case resulted in the Town of Clinton changing its dump to the sanitary land-fill method. The Town of Avon has been persuaded to do the same. Complaints have been received on the operation of the Peabody dump and investigation is in progress.

Suit has been brought against the Cumberland Cattle Company involving possible contamination of the Attleboro municipal water supply.

4. *Air and Water Pollution*:—Much has been said about air and water pollution. The Department of Public Health, on recommendation by the Division, issued its first water pollution order under G. L. c. 111, § 5A. The order, in substance, requires the Town of Amesbury to immediately undertake a water pollution abatement program.

The program to abate air pollution has developed slowly. In the past year, not more than two air pollution problems were referred to this office by the Department of Public Health.

5. *Welfare Review Cases*:—The Division defends decisions by the Department of Public Welfare in adjusting proceedings.

The remaining cases are of a miscellaneous nature. For example, the Division is presently maintaining a suit for one of the state colleges to obtain a tax refund. In another suit, the Division is defending the Commonwealth in actions brought by the City of Boston to obtain welfare reimbursements.

The various Departments normally file their own legislation. Most of the legislation filed by this Division is therefore remedial in nature. For instance, during 1965-1966, corrective legislation was drafted to remedy certain discrepancies in the original statute creating the Board of Higher Education.

There has been in preparation for the last year a publication entitled: *The Management of Administrative Records*. Its purpose is to promote sound administrative practice through the adoption of orderly procedures for managing state records.

Public Charities Division

The Division of Public Charities carries out the authority of the Attorney General to represent the public interest in the administration of charities. These proceedings are largely concentrated in the Probate Courts. The Division represents the public interest in estates administered by Public Administrators whereby money may be returned to the Commonwealth. The Division also considers petitions for the probate of wills of persons who leave no heirs surviving them.

Accounts filed by trustees form the bulk of the matters handled by this Division. In some trusts the charitable interests have been vested in possession, and funds are being expended for charitable purposes. In others the charitable interests are vested, but in remainder, and are not to take effect until after the termination of life interests. In many trusts the charitable interests are contingent only, often remotely.

The Division regularly reviews the accounts and questions any investments, charges or payments which do not appear to be proper. During this period we found that many trustees, some being large financial institutions, had improperly paid capital gains taxes in trusts where the entire principal has been or is soon to be devoted to charity. After a careful examination of the payments, we filed applications for abatements and refunds were obtained.

In addition to the accounts filed in the Probate Courts, several thousand annual financial reports under G. L. c. 12, § 8F, were received, recorded, examined and filed. Several hundred applications for certificates of registration under G. L. c. 68, §§ 19 to 31, were also handled.

Among the *cy pres* cases handled by the Division the following were of most importance.

The use of a small Post War Service Fund in Franklin for the purchase of a memorial organ in the new high school was approved by a decree of the Norfolk Probate Court.

The Child and Family Service of Springfield, Inc. was permitted more beneficial use of the funds bequeathed to them by *Albert A. Ball* due to a decree obtained through close cooperation of this Division and persons representing the charity.

In the *Clinton H. Scovell* estate arrangements were made, with our assistance, for distribution of a large amount of accumulated income to several charities interested under the will.

We supported the right of the Mistick Side Girl Scout Council, Inc., the only duly authorized agency of the Girl Scouts of America in this area, to receive the bequest in the *Edith M. Fox* estate amounting to about \$150,000. The testatrix had requested that the bequest be given to the Girl Scouts of Arlington.

A petition was filed in the Essex Probate Court regarding the \$2,000 gift under the will of *Samuel E. Sawyer* for the Marsella Street Home. Many years ago the City ceased operation of the Home. Following legal proceedings, the income from the fund was used for the care of children aided by the Welfare Department of the City of Boston. In 1954 the State assumed the responsibility for the care of all poor and neglected children in the City. The income of the fund was no longer used. The

petition asked for approval of the transfer of the fund to the State Department of Public Welfare. The income would then be used for the benefit of children committed to the care of the Department from the City of Boston.

In addition to handling the above mentioned *cy pres* cases, matters concerning the operation of charitable corporations is an important and time consuming function of this Division. In the proceedings for the dissolution of the *Horace Moses Foundation, Inc.* the transfer of all the assets of the corporation to an Ohio bank under an *intervivos* trust was protested. The Attorney General filed an answer asking that the transfer be declared invalid. The Ohio bank was joined as a party and an order requiring the Bank to return the funds to the corporation was requested.

We supported the position taken by the American Jewish Historical Society, that it would not be a violation under the will of *Lee M. Friedman* to construct a building for the Society's use on the campus of Brandeis University. The provision of the gift in the Friedman will required that the Society retain a separate independent status.

In another case the transfer of the funds of the *Norfolk House*, and certain other Roxbury charitable corporations, to the new *Roxbury Federation of Neighborhood Centers* was approved.

In the *Catherine Connolly* estate in Norfolk the Division learned that the executor had filed a petition questioning the validity of the charitable gifts under the will. However, the Attorney General has not been made a party to the proceeding as required. The estate had earlier been inventoried at about \$70,000. The residue was left to purchase clothing and lunches for the needy school children of the testatrix's birth place, Carraroe, Ireland. There was also a bequest for a drinking fountain there.

A decree had been entered by way of compromise, providing that the gifts failed but that one-half the residue of the estate should be paid to the Galway County Council (which served the village of Carraroe, twenty-five miles away) to be used for the benefit of needy school children in Carraroe. The other half was directed to be divided between a nephew of the testatrix living there and to the estate of another nephew who had died here. The decree provided that \$4,000 of the allotted residue be paid directly to the attorney for the nephew in Ireland in addition to \$2,000 out of another bequest.

A petition was filed by this Division attacking the validity of the decree because of the omission to make the Attorney General a party to the proceedings.

Objections were also made to items in the first account of the executor of \$10,000 for executor's fees and \$3,000 for an attorney's fee in

connection with the petition to which the Attorney General was not made a party. At a hearing on the account, a decree was approved reducing the charges by more than one-third.

Among the many petitions considered for license to sell real estate was one in the estate of *Irene A. Hyde* relating to the Hotel Touraine. Another related to property on Washington Street, Boston, held by the trustees under the will of *George Robert White*. A petition by the *Lotta M. Crabtree* trustees to borrow from one of the funds held by them to pay the cost of making repairs to the Hotel Paramount property on Boylston Street, damaged in an explosion and fire in January, 1966, was approved.

The most frequent problems handled by the Division in public administration concerned charges for services. In most cases the fees charged by public administrators are within reasonable limits. However, from time to time it is necessary to question the reasonableness of such charges. Usually there is a valid explanation. But in a few instances, despite explanations, we consider the fee to be excessive. In most such cases the objections are adjusted by compromise. When that cannot be done the matter is submitted to the Court and invariably our objections are sustained in whole or in part.

Torts, Claims and Collection Division

The Torts, Claims and Collection Division represents Commonwealth employees in tort actions brought against them. After a detailed investigation the Division assesses the liability upon the state employee and determines a reasonable amount for the damages involved.

During the past fiscal year, except for motor tort claims, all litigation involving torts have resulted in findings or verdicts favorable to the state employee.

G. L. c. 12, § 3B provides that the Attorney General shall defend state employees involved in an accident while operating a state owned vehicle.

The amount of settlement for any motor tort claim occurring before April 7, 1966, was \$10,000 for personal injury and \$5,000 for property damage. At the request of this Division the Legislature enacted in the Acts of 1965, Chapter 890, an increase in the settlement amount to \$25,000 for personal injury claims and \$10,000 for property damage claims. This became effective for motor tort claims occurring after April 7, 1966. The appropriation available for payment of tort claims under G. L. c. 12, §§ 3B, 3C and 3D was \$100,000 and was not increased accordingly for the past fiscal year. This Division points with understandable pride to the fact that it has not had to seek a supplementary appropriation from the Legislature for payment of motor tort claims.

During the past fiscal year records indicate that the average settlement for a motor tort claim, including verdicts and findings as a result of trials, was in the amount of \$372.33. This figure compares favorably with

average motor tort settlements for the previous fiscal year of \$312.09, with due consideration for the increase in costs of repairs, medical and hospital costs and a trend of increased verdicts and findings by juries and judges.

All correspondence is up to date, acknowledged and answered on a current basis and no litigant has been unreasonably delayed in trial or payment of claims.

Under G. L. c. 12, § 3A, the Division is responsible for moral claims (damages occurring under circumstances which impose a moral and not a legal liability upon the Commonwealth). A common type of moral claim is a deer crossing a highway and colliding with a motor vehicle. During the past year 21 such claims have been paid for an average settlement of \$121.11. This compares favorably with similar settlements for the previous fiscal year in the average amount of \$139.22. Seventy-six moral claims have been approved by this Division for a total amount of \$4586.23. The average settlement was \$60.34 while the average settlement for the previous fiscal year was \$42.24.

This Division is also responsible for the defense of claims arising from defects in state highways and Metropolitan District Commission boulevards throughout the Commonwealth. Numerous claims have been made for alleged defects in state highways, but no liability exists under our present statutes. In two cases the facts warranted settlement in the amount of \$1072.64. An average settlement of \$536.32 was paid by the Department of Public Works upon recommendation of this Division.

This Division also represents all state departments in civil actions to recover money due the Commonwealth for damage to state property, for care of patients in state institutions and for other obligations owed the Commonwealth.

The following collections have been made in 916 cases during the period covered by this report.

<i>Department</i>	<i>Number of Cases</i>	<i>Amount of Money</i>
Mental Health	133	\$171,455.11
Public Health	388	206,037.80
Public Works	214	27,792.55
Metropolitan District Commission	38	10,889.76
Public Safety	34	1,184.43
Correction	2	104.53
Education	84	8,620.32
Labor and Industry	1	65.00
Public Utilities	1	400.00
Public Welfare	2	90.00
Natural Resources	5	2,359.00
Youth Service	1	120.00
Soldiers' Home	1	135.00
Treasury	6	271.00
University of Massachusetts	1	25.00
Office of Secretary	5	225.00
		<hr/>
		\$429,775.43

There has been a significant increase during each year of our Administration in the sums collected for the Commonwealth in this area. Comparative figures may be found in the 1964 Annual Report.

Finally, members of this Division represent the Attorney General on the Motor Vehicle Appeal Board as required by the Statutes of the Commonwealth.

Veterans Division

The Veterans Division advises Massachusetts veterans of their rights and duties under State and Federal law. The Division furnishes legal assistance to veterans and to members of their families. It helps to guide veterans in the securing of the many special services, local, state and federal, available to them. The Veterans Division is available at all times to help veterans resolve any problems which may arise in this regard.

Many inquiries have continued to be directed to the members of the Division from veterans and their dependents, especially concerning tax problems.

This Division is called upon to hold frequent conferences with other state agencies and with local tax officials. Once again, we are most pleased to note our gratitude for the excellent cooperation received from the Commissioner of Veterans' Services and from his entire staff.

Exhibit A

1966 Legislation Proposed by the Department of the Attorney General

Conclusion

The work of the Department of the Attorney General, as can be seen from this report, is varied and at times difficult and highly technical. It requires a staff of conscientious and able lawyers who are sensitive to their responsibilities. The members of the Department have continued to provide the Commonwealth with the finest legal service possible, and I am grateful to them for their dedicated efforts, just as I am grateful for the continued opportunity to join with them in serving the citizens of Massachusetts.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General.

The Department of Mental Health may transfer voluntary patients to state, federal or private institutions, provided written consent of the patient is first obtained, and this power includes authorization to transfer to institutions in other states.

JULY 7, 1965.

HON. JAMES W. DYKENS, M.D., *Assistant Commissioner, Department of Mental Health.*

DEAR DOCTOR DYKENS:—I am in receipt of your letter of March 29, 1965 requesting my opinion regarding the authority of the Department of Mental Health to transfer voluntary patients to state, federal or private institutions, once written consent of the patient has been obtained.

Specifically, you have asked:

“Does the department have the power to transfer any voluntary patient to or from any state, federal, or private institution within Massachusetts, provided that the Department has first obtained the written consent of the patient?”

General Laws c. 123, § 20, par. 3, provides:

“The department shall not transfer any person to or from an institution licensed under sections 33 and 34A (private and federal institutions) . . . nor transfer any voluntary patient of any institution except with his written consent.”

It is clear from a reading of the above-quoted language that the answer to your first question is in the affirmative. The department is expressly authorized to transfer voluntary patients to or from federal or private institutions within Massachusetts, provided it has obtained their written consent.

In so far as transferring voluntary patients to or from state institutions within Massachusetts is concerned, the only relevant provisions are in c. 123, § 20, par. 1. That section provides:

“The department . . . may transfer to or from any hospital or school any patient . . . except that no patient shall be transferred between institutions while he is present as a voluntary patient. . . .”

This section, although in substance precluding the transfer of voluntary patients, makes no mention of the availability of consent to transfer. Logically, despite the absence of express statutory language on that point, where the original entry of the patient is voluntary, there is no reason why the patient may not also voluntarily consent to be transferred.

It is my opinion therefore that, with respect to voluntary patients, they may be transferred to or from state hospitals within Massachusetts, provided their consent is first obtained.

As a second question you ask:

“Does the Department have the power to transfer any voluntary patient to an institution in another state, provided that the Department has first obtained the patient’s written consent?”

The provisions of c. 441 of the Acts of 1956 do not provide any detailed procedure to be followed in effecting the interstate transfer of patients. That chapter in Article III (b) states in part:

“ . . . any patient may be transferred to any institution in another state whenever there are factors based upon clinical determinations indicating that the care and treatment of said patient would be facilitated or improved thereby.”

In view of the brevity and lack of detail of the above-quoted provision, it is reasonable to assume that it was the intent of the draftsmen that state law be applied whenever possible. This conclusion is confirmed by the language of various other sections of the compact expressly retaining in the individual party states authority to act pursuant to their own laws.

Consequently, in view of the absence of guiding principles to be followed in effecting interstate transfers and the general tenor of the compact regarding the supremacy of state laws, it is my opinion that the applicability of the interstate transfer provisions of c. 441 to voluntary patients must be determined according to the law of Massachusetts. Accordingly, then, the provisions of G. L. c. 123, § 20 would be applicable and the written consent of voluntary patients would be required both for transfers to out-of-state federal or private institutions, as well as for transfers to out-of-state public institutions.

The answer to your second question, therefore, is in the affirmative. The Department of Mental Health does have power to transfer voluntary patients to institutions in other states, provided the patient's written consent is first obtained.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

School committee expenditures for out-of-state travel which are necessary within the meaning of G. L. c. 71 § 34 do not require executive approval.

JULY 8, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—I am in receipt of your letter wherein you request interpretation of the provisions of c. 248 of the Acts of 1964. This act amends G. L. c. 40, § 5, cl. (34) and relates, among other things, to executive approval of expenses for travel outside the Commonwealth by municipal officers and employees. You have requested my opinion as to whether the requirement of executive approval inserted by the 1964 amendment applies to expenses for out-of-state travel by members of school committees. Prior to 1964, cl. (34) of the said § 5 contained the following language:

“(34) For the necessary expenses of municipal officers and employees of any particular department incurred outside the commonwealth in securing information upon matters in which the city or town is interested

or which may tend to improve the service in such department, including attendance at state police schools conducted by the department of public safety, attendance at schools for the training of local police officers conducted by the Federal Bureau of Investigation, the Massachusetts Chiefs of Police Association, the Boston police department, the Worcester police department, the Springfield police department, and the metropolitan district commission police department, and attendance at courses at colleges and universities for the training of police officers, if such appropriation is specified to be and is limited to such expenses incurred as aforesaid. Such expenses may also be incurred anywhere within the commonwealth and in such case shall be chargeable against any appropriation made for the ordinary maintenance of the department incurring the same."

The effect of the pre-1964 clause (34) of G. L. c. 40, § 5 on the out-of-state travel expenditures of a school committee was considered in *Day v. Newton*, 342 Mass. 568, which held that the Newton Board of Aldermen did *not* have power to delete an allowance in the school committee budget for travel by three committee members to a California educational conference.

The court's decision was based on the overriding effect of G. L. c. 71, § 34, which requires every city and town to provide annually an amount of money sufficient for the support of its public schools. Numerous court decisions have interpreted G. L. c. 71, § 34, to require a municipality to provide all the money "necessary" for the support of its schools; and in *Day v. Newton*, *supra*, the court held that the item for out-of-state travel was "necessary" within the definition of "necessary" established by the court, viz., the item was "*reasonably deemed by the committee to bear a relation to its statutory mandate.*" (Emphasis supplied.) *Day v. Newton*, *supra*, 570. It will be noted that the court has made it clear that *the school committee*, not some other municipal authority or the court, is the judge of whether an expenditure is "necessary," at least so long as the school committee acts reasonably. *Graves v. Fairhaven*, 338 Mass. 290, 293.

In *Day v. Newton*, *supra*, the court said, at page 572, that appropriations:

"... which are 'necessary' for schools *must* be made in the amount that the committee requests. We assume that c. 40, § 5, cl. 34, is applicable inasmuch as it is a part of the basic statement of *purposes* for which a municipality may appropriate funds. *Its intent as applied to the school committee is fully served* when the committee designates in its budget the item for out-of-state travel as the clause requires, and the board of aldermen, or other appropriating body, makes the appropriation with that restriction, and no other, applying thereto." (Emphasis supplied.)

By c. 248 of the Acts of 1964, the General Court amended cl. (34) of G. L. c. 40, § 5 so as to authorize expenditures for attendance at out-of-state training programs relating to special aspects of the duties of

municipal officers or employees. Clause (34) of G. L. c. 40, § 5 now reads:

“(34) For the necessary expenses of municipal officers and employees of any particular department incurred outside the commonwealth in securing information upon matters in which the city or town is interested or which may tend to improve the service in such department, *including any training program or programs for municipal officers or municipal employees, relating to special aspects of their duties* and including attendance at state police schools conducted by the department of public safety, attendance at schools for the training of local police officers conducted by the Federal Bureau of Investigation, the Massachusetts Chiefs of Police Association, the Boston police department, the Worcester police department, the Springfield police department, and the metropolitan district commission police department and attendance at courses at colleges and universities for the training of police officers, *authorized by the board of selectmen in a town, or by the town manager in a town having the same, by the mayor in a city, or by a city manager in a city having the same,* if such appropriation is specified to be and is limited to such expenses as aforesaid. Such expenses may also be incurred anywhere within the commonwealth and in such case shall be chargeable against any appropriation of the department incurring the same. *Total appropriations in any year under the provisions of this clause for the necessary expenses of municipal officers and employees of any particular department incurred outside the commonwealth shall be limited to one one-hundredth of one per centum of the average assessed valuation in a city or town of the three preceding years.*”

[The italicized portions indicate the additions made by the 1964 amendment.]

Prior to 1964, cl. (34) lacked any reference to authorization by a board of selectmen or other executive authority. This addition raises the question whether the Legislature limited the application of G. L. c. 71, § 34, as construed in *Day v. Newton*, *supra*, so as to make school committee expenditures for out-of-state travel contingent upon their prior approval by city or town executive heads.

In my opinion, c. 248 of the Acts of 1964 does not do this. The Legislature has the power to limit G. L. c. 71, § 34, or repeal it altogether. The fiscal independence of school committees is well established. To derogate from this fiscal independence, a clear indication of legislative intent is necessary. Absent such indication, G. L. c. 71, § 34 continues to give to school committees power to *require* the appropriation of funds covering those expenditures for out-of-state travel that are “reasonably deemed by the committee to bear a relation to its statutory mandate.” *Day v. Newton*, *supra*, 570.

This conclusion is supported by the legislative history of c. 248. Entitled, “An Act authorizing the appropriation of funds to cover the cost of in-service training for certain municipal officers or employees,” c. 248 was a redraft of H. 803, reported from the Joint Committee on Municipal Finance, in part, on H. 1171. Both H. 803, which was the

petition of the Citizens for the Advancement of the Public Service, and H. 1171, the petition of the Massachusetts League of Cities and Towns, bore substantially similar titles, to wit:—(803) “An Act to permit Cities and Towns to assist municipal officers and employees in a career service through in-service training programs.” H. 803 would have amended G. L. c. 71, § 34, to read, in part:

“(34) For the necessary expenses of municipal officers and employees of any particular department . . . in securing information upon matters in which the city or town is interested or which may tend to improve the services in such department, *including any training program or programs for municipal officers or municipal employees, authorized by the board of selectmen in a town. . .*” [or other executive officers listed in c. 248.]

Subsequently, after enactment in both branches, H. 803 was redrafted by the Governor’s Office and returned by special message (H. 3291) in the form thereafter adopted by the Legislature as c. 248 of the Acts of 1964. One change made by the Governor’s redraft was to reincorporate in the first sentence, after the word “including,” an itemization of various authorized police training programs. Such references had theretofore been in G. L. c. 40, § 5, cl. (34) and presumably the Governor wanted to make it clear that authorization for them was not being withdrawn. As a result of this drafting change, the clause “authorized by the board of selectmen in a town . . .” ceased to follow directly after the words “any training program or programs for municipal officers or municipal employees.” Hence, while in original H. 803 the “authorized by” clause probably modified “training program or programs,” in the final draft it became isolated from “training program or programs,” and assumed a location where it could be said to require prior authorization of any out-of-state travel expenditure by the designated authorities.

The principal object of H. 803 and H. 1171 was to provide for in-service training for municipal employees with appropriate limitations. There is no indication that any part of their object was to take away the traditional and long-established fiscal powers of school committees. The redraft of H. 803 by the Governor’s Office, which resulted in the wording here questioned, was to make sure that programs for police training authorized in the past would not be excluded by the amended bill and to make various technical improvements. Had the Legislature wanted to take the far-reaching step of placing school committee travel under the control of city or town executives, the Legislature could have said so in unmistakable language.

Accordingly, I am of the opinion that school committee expenditures for out-of-state travel which are “necessary” within the meaning of G. L. c. 71, § 34, as interpreted in *Day v. Newton*, must continue to be provided by cities and towns whether or not authorized by the board of selectmen or other town or municipal executives listed in c. 248 of the Acts of 1964.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Children who reside on federal reservations within the Commonwealth and who attend local schools shall be included within the geographical limits of such municipality for purposes of state aid to education.

JULY 8, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—You have asked my opinion on the following question:

“Can the Department of Education under Chapter 70 of the General Laws reimburse Chicopee for youngsters who live on the Federal installation at Westover Field and who attend Chicopee schools?”

Chapter 70 of the General Laws is remedial in nature, and its purpose is “to promote the equalization of educational opportunity in public schools of the Commonwealth and the equalization of the *burden* of the cost of schools to the respective towns.”

This statement of purpose was inserted by c. 643 of the Acts of 1948 at which time the format of state aid to cities and towns was generally revised. The new formula is based upon the number of persons “between the ages of seven and sixteen in the several towns as determined in the registration of minors required by section two of chapter seventy-two . . .” (G. L. c. 70, § 4.) Section two of c. 72 of the General Laws requires that “the school committee of each town shall ascertain and record the names, ages and such other information as may be required by the Department of Education, of all minors residing therein between five and sixteen, and of all minors over sixteen who do not meet the requirements for the completion of the sixth grade of the public school of the town where he resides.”

Thus the question is: Are minors who reside on the federal installation at Westover residents of Chicopee for the purposes of such registration?

It is my opinion that they are. The first purpose of c. 70 will be fulfilled by the fact that reimbursement to Chicopee for the costs of the education of the pupils in question will increase the *total* amounts available for education in Chicopee and thus improve the educational opportunities available to all Chicopee public school pupils.

The second purpose of c. 70 is equally applicable. Failure to consider the school pupils who reside on the military reservation increases the burden on local taxpayers and is contrary to the express intent of the statute that the local burdens be equalized by state reimbursement of part of the per pupil cost of instruction.

The opinion of the Attorney General (VI A. G. 593) given in 1921 interpreting the old state aid statute is not controlling on the present facts and statutes.

That opinion held that the Town of Harvard was not under any legal obligation to provide school facilities for children living on the Fort Devens federal reservation and, therefore, not entitled to count them for state aid purposes. The opinion relied primarily on *Fort Leavenworth v. Lowe*, 114 U.S. 525 (1885) and *Opinion of the Justices*, 1 Met. 580 (1841). These decisions were based on the proposition that since Art. 1,

§ 8 of the Constitution of the United States gives Congress exclusive jurisdiction over "all places purchased by the consent of the Legislature of the state in which the same shall be" for the erection of forts, etc., that such places cannot be subject to state jurisdiction except as the state has specifically retained jurisdiction, and in that sense are not "within" the state.

This construction is, of course, proper and controlling in case of conflict between federal and state jurisdiction. However, it must be remembered that in our federal system, the constitutions and laws of both the state and federal governments are to be construed as functioning compatibly together and not at arm's length.

The *Fort Leavenworth* case itself recognized this principle:

"In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution."

The Supreme Court later stated in *Silas Mason Co. v. Tax Comm.*, 302 U.S. 186 (1937), that:

"... The mere fact that the Government needs title to property within the boundaries of a state (*Kohl v. U.S.*, 91 U.S. 367) does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction. We have frequently said that our system of government is a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency. In acquiring property, the federal function in view may be performed without disturbing the local administration in matters which may still appropriately pertain to state authority."

In *Independent School District v. Central Education Agency*, 247 S.W. 2d 597 (1952), the Texas Court of Civil Appeals upheld a Texas statute which specifically included the Fort Bliss Military Reservation in the El Paso school district for state aid purposes. The Court held that even though exclusive jurisdiction had been ceded to the United States, Fort Bliss in accordance with the statute and the action of the State Board of Education, had become part of the El Paso school district. The court stated at page 608:

"We did not say, nor did we intend to say that, geographically speaking, a military reservation or other federal-owned lands could not be 'contained' within a school district. They may be so contained just as Fort Bliss may continue to be contained within El Paso county and within the state of Texas.

"We fully agree with appellees that the purpose of section 5 of Article 2922-16 was to equalize the financial burdens of school districts by making allowance for tax exempt property contained within the districts. This sound principle of tax equalization should be extended and not

restricted and we feel certain that the courts will not interfere with the application of this statute as intended by the legislature."

The Fort Bliss Reservation was acquired by the United States from Texas under the same type of cession by which the Westover Reservation in Chicopee was acquired from Massachusetts.

The reasoning of the Texas Court is sound and, in my opinion is applicable to our Massachusetts statute.

In the period since the 1921 Fort Devens opinion, the Federal Government has relinquished to the states a considerable amount of authority over federal reservations. It has given to the states the power to apply their own workmen's compensation laws [49 U.S. sts. at large, 1938 (1936)]; the right to collect taxes on gasoline on military reservations [49 St. 1521-1522 (1936)]; and the right to collect income taxes from residents in federal areas [54 St. 1059].

The Massachusetts income tax law (G. L. c. 62, § 5A) imposes a tax on income earned "within the commonwealth" and this tax is assessed on federal employees at Westover Field, excluding any uniformed military personnel whom the statute itself excepts.

It is thus clear that for income tax purposes both the Federal Government and Massachusetts regard Westover Field as being within the Commonwealth.

At the time the decisions upon which the 1921 opinion relied were made, financial support of the public schools in Massachusetts rested almost entirely on the general property tax and thus it was quite appropriate to hold that once the local community lost the power to tax, it had no responsibility to render services and consequently no right to state aid. Today the situation is very different. Substantially every one of the other forty-nine states construes its state aid laws to include children residing on federal reservations.

In my opinion, the clear intent of G. L. c. 70, § 4 is that children who reside on the federal reservation at Westover Field and who attend the Chicopee Schools be included within the geographical limits of Chicopee for purposes of state aid to education.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The state treasurer must look to the Commissioner of Education for a determination as to whether the state aid checks in the Treasurer's possession should be released. The releasing or withholding of such funds is to be determined on the Commissioner's decision as to whether or not a racial census is a part of the annual return of the municipality.

JULY 9, 1965.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General*.

DEAR TREASURER CRANE:—I have received your letter on June 29,

1965, wherein you request my opinion of the effect of the recent decision of the Supreme Judicial Court in the case of *School Committee of New Bedford v. Commissioner of Education*. Specifically, your letter reads as follows:

"Upon receipt of the copy of the Supreme Court Decision relative to the 'School Committee of New Bedford & others vs. Commissioner of Education & another,' could you please advise me whether or not as cited on page 10, 3., 'The interlocutory and final decrees are reversed and the case is remanded to the Superior Court for further proceedings consistent with this opinion.'

"May I now release two checks which have been held by me, as State Treasurer, to the City of New Bedford; and in view of your previous decision to me, whereby I was to withhold money issued under Chapter 70 of the General Laws."

Your questions must be answered in the light of certain background material. Early in 1964, Commissioner of Education, Owen B. Kiernan, determined that a so-called "racial census" would be desirable in order to furnish the department with information concerning racial patterns in the public schools throughout the Commonwealth. By an opinion rendered on February 10, 1964, I advised the Commissioner that such information could lawfully be requested, and that the cities and towns would be obliged to comply with the department's racial census directives.

The City of New Bedford refused to provide the information sought by the Commissioner of Education. Instead, on June 12, 1964, the City filed in the Superior Court for Bristol County a petition for declaratory judgment, seeking a declaration, (a) that the Commissioner could not lawfully require the City to conduct a racial census in the New Bedford schools, and (b) that school aid to which the City would ordinarily be entitled under c. 70 of the General Laws could not lawfully be withheld as a result of failure to take the requested census. A demurrer was filed on behalf of the Commissioner, which demurrer was sustained by the Superior Court on July 21, 1964. On September 28, 1964, a final decree was entered dismissing the petition. The City of New Bedford appealed to the Supreme Judicial Court from the interlocutory decree sustaining the Commissioner's demurrer and from the final decree dismissing the petition.

While this appeal was pending, the City of New Bedford continued to resist requests by the Commissioner that a racial census be conducted. Accordingly, the Commissioner ordered that the amounts normally payable to New Bedford under G. L. c. 70, § 3 be withheld for the reason that the City had failed to provide the Commissioner with the reports and returns required by G. L. c. 72, § 6. In response to a request submitted by your department with respect to the legality of such withholding of state aid funds, I replied, on April 29, 1965, as follows:

"It is my opinion that you are not authorized to distribute funds, pursuant to G. L. c. 70, § 3, unless and until the Commissioner informs you or a court of competent jurisdiction rules that the reports required under c. 72 have been filed with the Commissioner's office in accordance

with applicable provisions of the General Laws. To date, no such information has been given or ruling issued."

The Supreme Judicial Court has now ruled upon the appeal, and the question has arisen whether the decision authorizes you to release the presently withheld state aid amounts for payment to New Bedford. In brief, the Court's ruling is based upon a procedural consideration only, although the Court does include extensive additional comments or "dicta" addressed to the legality of the taking of a racial census as well as to the legality of the withholding of school aid amounts. As a result of the Court's limitation of its holding to a ruling on procedure and the accompanying remand of the case for further proceedings in the trial court, the legal situation with respect to the funds currently held in the Treasury is—for all practical purposes—the same as it was prior to the commencement of litigation.

The final decree entered in favor of the Commissioner of Education by the Superior Court was based upon the sustaining of a demurrer filed on the Commissioner's behalf. The Supreme Judicial Court noted, however, that—under the circumstances—a demurrer was not a proper pleading in response to the petition for declaratory judgment, and consequently the demurrer should not have been sustained.

"There was no basis for filing a demurrer and it was error to sustain it. The plaintiffs stated a case entitling them to a declaration of rights. . . . The plaintiffs had standing to seek declaratory relief in interpreting the statutes applicable to their duties as to which a controversy had arisen."

Accordingly, the Court ordered that "[t]he interlocutory and final decrees [in favor of the commissioner] are reversed and the case is remanded to the Superior Court for further proceedings consistent with this opinion." This order was entered solely as a result of the Court's position on a question of pleading, and was intended to have absolutely no effect upon the substantive questions of the racial census and the withholding of school aid.

So that there could be no mistake as to the meaning of the reversal of the decrees favoring the Commissioner and of the remand for further proceedings in the Superior Court, the Supreme Judicial Court included in the opinion its views upon the merits of the controversy.

"It may be that the bill states with substantial accuracy the relevant facts. That, however, cannot be determined in advance of the filing of the defendants' answers and trial on the merits. Thus we do not afford declaratory relief finally on this record. Nevertheless, because it will hasten the conclusion of this public controversy, we state briefly certain applicable principles of law."

The Court concluded that the Commissioner could lawfully require the taking of a racial census.

"We have no doubt (a) that the commissioner has power to require relevant, unsworn information, reasonably required by him, to be filed by local school authorities separately from the annual return, or (b) that

the production of such separate information may be enforced by mandamus."

The Court implies, elsewhere in the opinion, that such information may also be required as a part of—rather than separately from—the annual return.

The Commissioner, the Court explained, has the responsibility of supervision of all educational work supported wholly or partially by the Commonwealth. He is charged with the duties of recommending improvements in present educational systems, and of collecting information with regard to the condition of the public schools. The Court determined that the Commissioner must—in order properly to fulfill such functions—be vested with a substantial range of incidental authority. "The statutes (especially c. 72, § 3) sufficiently express a legislative intention that the Commissioner shall have power to compel the production of reasonable information by the cities and towns relevant to education in the cities and towns and to pending educational problems of the department."

The Court further commented:

"The relevance of the information sought cannot reasonably be questioned. We take judicial notice of the fact that controversial racial problems currently affect the administration of public schools, even in Massachusetts, and that information about the racial composition of student bodies may be of value to the department's work."

Thus, the Supreme Judicial Court has made it crystal clear that the Commissioner of Education may lawfully require a racial census, and could even invoke the power of the judiciary to compel the cities and towns to comply with such a directive.

Similarly, the Court concluded that—should the racial census report be included by the Commissioner as a part of the required annual return for a given year—failure to provide such a report could be a ground for the withholding of state aid funds. Since the case reached the Supreme Judicial Court without findings of fact made after a trial on the merits, the Court was unable definitely to determine whether the racial census had been intended by the Commissioner as a part of such annual return. The Court assumed that the Commissioner had not so considered it. However, should a hearing on the merits reveal that the racial census was in fact required as a part of the formal annual return, the sanction provided for in G. L. c. 72, § 6 [withholding of state aid] could lawfully be imposed.

I am aware that the comments of the Court upon the taking of a racial census and the withholding of school aid are "dicta" only, and do not represent actual holdings or rulings at the present time. But the discussion of these legal principles is significant, for the views of present members of the tribunal are thereby recorded; such views will undoubtedly control the rulings in future cases. The parties to the present controversy should benefit from the informal declaration of the law provided by the Commonwealth's highest Court.

Consequently, in light of the above, you—as State Treasurer—must in

the first instance look to the Commissioner of Education for a determination as to whether the state aid checks presently in your possession should be released. There is at this time no judicial order on record which would compel either retention or immediate release of the checks in question. Should the Commissioner determine that the racial census report is a part of the annual return, and that such a report has not been filed, he may order that state amounts still be withheld. If, on the other hand, the Commissioner concludes that the racial census report is not a part of the annual return—or if such a conclusion is arrived at after a hearing upon the merits in the Superior Court—then the funds must be released and paid over to the City of New Bedford. It is of course to be hoped that the parties to this dispute may reach a resolution of their differences in accord with the principles set forth by the Supreme Judicial Court, and that after such agreement the funds may speedily be released.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The comptroller of the commonwealth is without authority to direct the withholding of payments; his duties, in respect to the processing of accounts, are ministerial only.

Despite the "veto" provisions contained in St. 1956, c. 718; St. 1961, c. 590; St. 1962, c. 782; and St. 1963, c. 822, land takings in Suffolk County made by the Department of Public Works are valid, and unencumbered funds available from accounts authorized by the Accelerated Highway Program statutes other than those enumerated acts, may lawfully be used to pay compensation therefor.

JULY 9, 1965.

HON. FRANCIS M. SARGENT, *Commissioner of Public Works*.

Re: L.O. 5440 (Suffolk) Parcels 1 through 6—Damage Payments.

DEAR COMMISSIONER SARGENT:—I have received your letters of May 21 and 27, 1965, wherein you request my opinion upon certain questions raised in connection with certain land takings by eminent domain in the City of Boston. You have provided me with the following facts relative to the takings and to the circumstances which led the Department to take action with respect to the properties involved.

The parcels taken [Parcels 1 through 6 in Layout No. 5440 (Suffolk)] fall within the area designated as a route for the so-called "Inner Belt," Interstate Route 695. The Inner Belt is to be constructed pursuant to a series of authorization and appropriation statutes which provide for an "Accelerated Highway Program." The Inner Belt is one of a variety of projects to be carried on under these statutory provisions. Certain of these statutes (St. 1961, c. 590; St. 1962, c. 782; St. 1963, c. 822) provide that the funds appropriated therein may not be expended for projects lying within the towns of Brookline and Saugus, or the cities of Boston, Cambridge, Lynn, New Bedford, Peabody, Revere, Somerville and

Springfield, without approval of the route by the mayor of the city or the selectmen of the town affected.

On June 18, 1963, then Commissioner of Public Works, Jack P. Ricciardi, wrote to the Mayor of Boston requesting that "approval be given for the Boston Section of the Inner Belt from the end of the present construction in the vicinity of Massachusetts Avenue to the Boston-Brookline Line in the vicinity of Beacon Street, as recommended in the Inner Belt and Expressway Report, copies of which have been forwarded to you." On July 18, 1963, the Mayor of Boston replied in part as follows:

"... I wish to indicate my approval with respect only to the general location of this facility to enable the Department to proceed with preliminary engineering design. Inasmuch as the Inner Belt and Expressway Study recommended route has two alternative designs, because the recommended routes as shown in the Inner Belt Report are drawn at small scale, because of urban renewal projects in this area and because of potential relocation problems, I withhold any approval regarding exact geometric and functional design until such time as preliminary engineering has been completed."

On March 31, 1965, the Department of Public Works adopted an Order of Taking relative to the parcels in question. The Order of Taking recited that the properties were being taken from the Green Shoe Company, the City of Boston and Owners Unknown, and was recorded in the Suffolk County Registry of Deeds on April 7, 1965.

On May 14, 1965, you caused to be submitted for payment Department of Public Works Purchase Order No. 781863 on the 1962 Highway Improvement Loan Account No. 7775-67. The Comptroller refused to process that invoice and others of the same date on the same account. He returned the invoices after advising your Department orally that he was taking such action because the condition precedent in Section 12 of Chapter 782 of 1962, the Highway Improvement Loan, had not been fulfilled. On May 27, 1965, you caused to be submitted to the Comptroller for processing three invoices for payment of damages arising from the captioned takings. They constituted Purchase Order No. 781850 on the 1954 Highway Improvement Loan (F.A. Interstate) Account No. 7771-23-00. By letter to you of June 18, 1965, through his Deputy Thomas J. Sullivan the Comptroller returned said invoices. The reason stated for that action was that the approval of the Interstate 695 Project by the Mayor of Boston has not been filed with the Comptroller in compliance with St. 1956, c. 718 § 4A or St. 1961, c. 590 § 4 or St. 1962, c. 782 § 12 or St. 1963, c. 822 § 9.

You have informed me that the unencumbered, unexpended balance of the 1954 Highway Improvement Loan is sufficient to pay the damage awards for the takings in question. Chapter 403, St. 1954, creating said 1954 Highway Loan, contains no provision requiring approval by any official of the City of Boston prior to the expenditure of any part thereof.

In substance the Comptroller asserts that the takings, adopted March

31 and recorded April 7, 1965, were invalid. In light of his refusal to process payment therefor and of the facts set forth above, you have requested my opinion upon the following questions:

1. Does the letter dated July 18, 1963, from the Mayor of Boston to the then Commissioner of the Massachusetts Department of Public Works, Jack P. Ricciardi, constitute approval of the Boston section of the Inner Belt in the vicinity of Massachusetts Avenue to the Boston-Brookline Line, in the vicinity of Beacon Street, as required under Section 12 of Chapter 782, Acts of 1962?

2. Does the Comptroller of the Commonwealth have the authority to refuse to process the payment of the awards for the takings under the Order of Taking dated March 31, 1965?

St. 1962, c. 782, § 12 provides:

"No money shall be expended under this act by the state department of public works for projects in the towns of Brookline or Saugus, of the cities of Boston, Cambridge, Lynn, New Bedford, Peabody, Revere, Somerville or Springfield until such projects have been approved and accepted by the selectmen of said towns, the mayor of the city of Boston, Lynn, New Bedford, Peabody, Somerville or Springfield or the city manager of the city of Cambridge or Revere."

This "veto" provision does not specifically indicate exactly to what the word "projects" refers, or what elements of the Inner Belt Highway scheme were to be subject to approval and acceptance. This question was considered in an opinion rendered by this Department on September 3, 1963 on the subject of the veto power given the cities and towns along the Inner Belt route. It was stated at page 2 of that Opinion:

"The initial use of the word, 'projects,' in said section 12 is an unambiguous description of the total highway activity described in said Chapter 782. The language of said section 12 does not limit the meaning of 'projects' by delineating specific components of total highway activity such as location or design.

"It is my opinion that the officials of the cities and towns listed in said section 12 have the power to approve and accept the concept of highways, the exact location of highways, and the actual geometric design of highways included in projects set forth in Chapter 782, Acts of 1962. . . ."

The letter sent by the Mayor of Boston to former Commissioner Ricciardi at most expresses satisfaction with the general location of the Boston Section of the highway. In light of § 12 of St. 1962, c. 782 and of the Opinion of the Attorney General interpreting it, the letter of the Mayor could not, at the time it was written, be considered to constitute approval. The Mayor specifically withheld final approval with respect to several aspects of the highway construction, and clearly did not intend his letter to serve as authorization for completion of the Boston Section of the Inner Belt.

In 1963, however, the General Court altered the scope of the approval power. The "veto" power contained in St. 1961, c. 590, § 4 and in St.

1962, c. 782, § 12 is carried over into St. 1963, c. 822, § 9, but with the following addition as the third paragraph thereof: "For the purposes of this section 'project' shall mean only the route through the particular city or town and shall not include the actual design of or any engineering detail of the highway to be constructed." In addition the Legislature created the Board of Project Review for the purpose of resolving some of the disputes which had arisen over Inner Belt routes. These changes represent an attempt by the Legislature to reduce the power formerly exercised by certain cities and towns over the progress of the highway system in question.

Nevertheless it cannot be said that the 1963 amendment transforms the letter of the Mayor into an approval of the Boston section of the Inner Belt. The letter in question from the Mayor to Commissioner Ricciardi is dated July 18, 1963. The amendment which reduced the approval authority of the municipalities was not enacted until November 15 of that year. Clearly, the Mayor did not intend his letter to constitute approval, nor did he expect that its provisions would be transformed into approval by legislative fiat. To rule that the 1963 amendment should be applied retroactively would be to make the approval authority illusory in this instance, since the right of the Mayor to approve even the route has in actual fact been taken away. In my opinion the General Court did not intend the 1963 amendment to transform into approval a letter which obviously was not intended as such by its author. Accordingly, in response to your first question, the letter of July 18, 1963 from the Mayor of Boston does not constitute approval of the Boston section of the Inner Belt. Despite the changes effected by the amendments of 1963, some further indication from the Mayor will be necessary before it can be held that the Boston section has been approved.

In response to your second question, it is clear that the Comptroller of the Commonwealth is without authority to refuse to process the awards in question for payment. The powers of the Comptroller of the Commonwealth are set forth in § 13, c. 7 of the General Laws, which provides:

"The comptroller shall examine all accounts and demands against the commonwealth . . . the comptroller shall make a certificate specifying the amount due and allowed on each account or demand so examined, the name of the person to whom such amount is payable, and the account to which it is chargeable; and if it appears to him that there are improper charges in said accounts or demands he shall report the same to the governor and council, with a separate certificate therefor. . . ."

The Supreme Judicial Court has interpreted G. L. c. 7, § 13 so as to make it absolutely clear that the duties of the comptroller with respect to the processing of accounts are ministerial only.

"It is clear that the comptroller himself has no authority to direct the withholding of payments. If he thinks that some charge is improper, it is then his function to report it to the governor and council." *Ward v. Comptroller of the Commonwealth*, 345 Mass. 183, 186. *O'Connor v. Deputy Commissioner and Comptroller*, 1965 Adv. Sh. 329.

Accordingly, should the Comptroller determine that the awards author-

ized by the Department of Public Works are improper, he cannot lawfully prohibit payment solely on his own initiative. He is limited to reporting the same to the Governor and to the Executive Council and making a recommendation that the amounts in question not be paid. The actual determination not to pay, however, must be made by the Governor and Council and cannot be made by the Comptroller.

There must still be resolved questions relating to the validity of the takings in question and to the funds to be used to pay the awards voted to compensate for damages arising from said takings.

The Acts of 1961, 1962 and 1963 which relate to the Accelerated Highway Program specifically provide that funds may not be expended under those acts for projects in certain enumerated communities without the express approval of such projects by the chief executive authorities of the municipalities involved. There can be no doubt, therefore, that municipal approval is a condition precedent to lawful expenditure of any of the funds raised by the bond issues authorized by St. 1961, c. 590; St. 1962, c. 782; or St. 1963, c. 822. Funds appropriated by St. 1956, c. 718 cannot be used since section 4A of that Chapter contains a "veto" provision applicable to the City of Boston. Consequently, in light of the fact that approval of the Boston section of the Inner Belt has yet to have been given, funds from accounts created by the above-mentioned statutes cannot lawfully be used to pay for the takings in question.

However, the so-called "veto" provisions which appear in certain acts relating to the Accelerated Highway Program do not in any way restrict the general authority delegated by the Legislature to the Department of Public Works to take land for state highway purposes. Section 7 of Chapter 81 of the General Laws provides:

"If it is necessary to acquire land for the purpose of a state highway outside the limits of an existing public way, the department may take the same by eminent domain on behalf of the commonwealth under chapter seventy-nine. When injury has been caused to the real estate of any person by the laying out . . . of a state highway, he may recover compensation therefor from the commonwealth under chapter seventy-nine."

The General Court has vested in the Department of Public Works unlimited authority to acquire land by eminent domain for the purpose of construction of state highways. No statutory provisions appear which would operate to restrict this general grant of power in any way. All lands within the Commonwealth outside the limits of existing public ways are subject to the provisions of G. L. c. 81, § 7, including lands which have been proposed as a route for the Inner Belt.

Once lands have been taken by the power of eminent domain vested in your Department, the Commonwealth is legally obligated both by its Constitution and by Chapter 79 of the General Laws to award and to pay damages in fair and reasonable amounts.

The general eminent domain power conferred upon the Department by G. L. c. 81 § 7 has in no way been restricted by the approval provisions contained in certain Accelerated Highway Program statutes previously cited herein. Those so-called "veto" provisions relate solely to the

expenditure of funds authorized by the acts in which such provisions appear. The language "no money shall be expended *under this act . . .*" [Emphasis supplied.] is unambiguous. The scope of the approval authority and requirement cannot be expanded beyond the use of those funds which have been authorized by the particular acts in which such language is included.

What the intent of individual legislators relative to the scope and effect of the Inner Belt veto may have been cannot, of course, be determined definitely at this date. However, the Commonwealth must be bound by the clear and unambiguous limitation of the effect of the approval provisions to the specific acts in which they are included. The General Court has not amended or restricted G. L. c. 81, § 7 in any way. There has been created no legal impediment to the taking by the Department of Public Works of whatever lands it considers necessary for state highway purposes. Fulfillment of the constitutional obligation to pay for the property as taken cannot be frustrated by restrictive language which relates solely to certain specific accounts, nor does it appear that the Legislature intended even to attempt such a result.

The restrictions contained in the 1956, 1961, 1962 and 1963 statutes relate solely to the expenditure of funds authorized by those acts, and do not affect the general power of the Department to take lands for state highway purposes. It should be noted that most of the Accelerated Highway Program statutes do not contain "veto" provisions. As a result, unencumbered funds, authorized by such acts, can be used without limitation to pay for takings made by the Department. Accordingly, the fact that the Mayor of Boston has yet to approve the Boston section of the Inner Belt restricts only the use of funds from accounts created by St. 1956, c. 718; St. 1961 c. 590; St. 1962, c. 782; and St. 1963, c. 822. The land takings in question (Parcels 1 through 6 on Layout 5440 [Suffolk]) are clearly valid. Any unencumbered funds available to your Department from accounts authorized by the Accelerated Highway Program statutes other than those of 1956, 1961, 1962 and 1963, may lawfully be used to meet the Constitutional obligation of the Commonwealth to pay compensation therefor. The Comptroller may not lawfully refuse to process such payments.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Money raised by taxation can be used only for a public purpose and not for the advantage of private individuals.

No payments can be made under Resolves 1964, c. 113, since the condition to payment as expressly stated by the Legislature cannot be met.

JULY 19, 1965.

HON. THEODORE W. SCHULENBERG, *Commissioner, Department of Commerce and Development*.

DEAR COMMISSIONER SCHULENBERG:—I have your request of June

11, 1965 wherein you request an opinion relative to c. 113 of the Resolves of 1964, which provides in part as follows:

"Resolved, That for the purpose of discharging certain moral obligations of the commonwealth, the mass transportation commission is hereby authorized and directed to pay the following sums of money:—said persons being former employees of the Geotechnics and Resources, Inc. of New York and such sums being due them for wages owed for services performed for the said mass transportation commission; provided, however, that any payments made to the individuals named herein shall in each such case and in all cases cause and empower the commonwealth by and through the mass transportation commission to be subrogated to the rights which each such individual has against the said Geotechnics and Resources, Inc. in order that the commonwealth may recover from any fund, asset, real or personal property owned by or which Geotechnics and Resources, Inc. has a right to, any and all monies paid hereunder."

The facts material to this issue were presented to me by your predecessor in office, former Commissioner Lester S. Hyman.

The individuals involved and recited in c. 113, Resolves of 1964 were local employees of Geotechnics and Resources, Inc., which firm was under contract to the former Mass Transportation Commission to perform services for the Commission's planning project.

By c. 636 of the Acts of 1964, the duties and obligations of the Mass Transportation Commission were absorbed by your department.

Geotechnics and Resources, Inc. was adjudged bankrupt in December, 1963 in a Federal Court in Texas. The purpose of the Resolve is to pay the individuals named earned wages which they did not receive because of the bankruptcy of their corporate employer.

Item No. 1501-12 of c. 541 of the Acts of 1965 (the deficiency appropriation act) which appropriated \$8,218 for the payment of certain moral obligations depends for its authorization on c. 113 of the Resolves of 1964.

Chapter 113 authorized payment on the express condition that "any payments made . . . shall cause and empower the commonwealth to be subrogated to the rights which each individual has against said Geotechnics and Resources, Inc."

The Federal Bankruptcy Statute (11 USCA § 93(n) as amended September 25, 1962, Pub. L87-681, § 5, 76 Stat. 570) states in part: ". . . claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed. . . ."

The individuals in question did not file a claim within the proper time limit and thus there are no existing rights to which the Commonwealth may be subrogated. Therefore, it is my opinion that payment to them would be improper.

Since these individuals were employees of a private firm and not of the Commonwealth, the present issue raises the question as to whether this kind of appropriation meets the frequently declared principle of constitutional law that "money raised by taxation can be used only for a public purpose and not for the advantage of private individuals."

Opinion of the Justices, 231 Mass. 603, 611; 313 Mass. 779, 783; *Opinion of the Justices*, 231 Mass. 773, 775; *Eisenstadt v. County of Suffolk*, 331 Mass. 570, 573-574; *Opinion of the Justices*, 337 Mass. 779, 781. However, assuming the resolve is constitutional, since the claimants have no existing rights because of their failure to file a claim before the Bankruptcy Court, the condition to payment as expressly stated by the Legislature cannot be met and no payments should be made under Resolves 1964, c. 113.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The laws of the commonwealth contain no prohibition against a decision, by secret ballot, made by the trustees of the University of Massachusetts to select the location of the new medical school, and the law contains no provision to compel each trustee to disclose the nature of his vote.

JULY 19, 1965.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth*.

DEAR GOVERNOR VOLPE:—On July 15, 1965, you submitted the following request for an opinion:

“At the request of the Citizens Committee on the Medical School Site in Amherst I should like to have your opinion as to whether the laws of the Commonwealth permit the trustees of the University of Massachusetts to select the site of the new medical school by way of secret ballot.”

I understand that the trustees of the University of Massachusetts met in Amherst on June 11 for the purpose of selecting a location for the new University of Massachusetts Medical School which is soon to be constructed. Although the public was allowed to attend the meeting and to witness the discussions and deliberations of the trustees, the actual vote to determine the location was taken by secret ballot. The result of the vote [12 to 10 in favor of the City of Worcester as the site] was announced to the public; but no indication was given as to how each individual trustee had voted. Your letter requests my opinion on the question whether the taking of a secret ballot in such a situation is authorized by the laws of the Commonwealth.

A determination of this question depends upon interpretation of G. L. c. 30A, § 11A, the so-called “open-meeting law.” This statute provides in part as follows:

“All meetings of every state board and commission and of the governing board or body of every authority established by the general court to serve a public purpose in the commonwealth or any part thereof shall be open to the public and to the press unless such board or commission or the governing board or body of such authority shall vote to go into executive session. . . . All state boards and commissions and the governing boards or bodies of all such authorities shall maintain

accurate records of their meetings, setting forth the action taken at each meeting, including executive sessions. A summary of all matters voted shall be made available with reasonable promptness after each meeting. . ."

There is no doubt that the trustees of the University of Massachusetts conform to the concept of a "State board" and are consequently subject to the provisions of the "open-meeting law." The trustees are referred to as a "board" in G. L. c. 15, § 20, the section which identifies whom the trustees are to be. Likewise, it is clear that the trustees are responsible for the management of a State institution.

"The state university shall be the University of Massachusetts which shall continue as a state institution within the department of education but not under its control and shall be governed solely by the board of trustees established under section twenty of chapter fifteen. . . ." *General Laws* c. 75, § 1, as amended.

Thus, it is clear that the trustees of the University must be considered members of a "State board," and that they are required by c. 30A, § 11A to hold meetings which are public in nature.

Nevertheless, I find no provision in G. L. c. 30A, § 11A which would prohibit the trustees from choosing to proceed by the method of a secret ballot. The "open-meeting law" requires that the meeting itself must—except when certain specified situations occur, at which times the board may vote to proceed in executive session—be conducted in public. Notices of each meeting must be posted, and accurate records must be maintained. The records of each meeting are to become public records.

The trustees are subject to no obligations relative to the holding of public meetings except those imposed by c. 30A, § 11A, and accordingly need meet only the requirements contained in that section. The only reference in the statute to information relating to votes taken by the board occurs in the third paragraph, and provides that "[a] summary of all matters voted shall be made available with reasonable promptness after each meeting; provided, however, that votes taken in executive session may remain secret so long as their publication would defeat the lawful purposes of the executive session, but no longer." Consequently, the trustees were obliged to announce—and did announce—the result of the vote which selected the City of Worcester as the site for the medical school. But nothing appears in the law which would obligate each individual trustee to reveal how he voted, or which would require the board's records to contain the same, and the board could lawfully exercise discretion to withhold such information.

That the General Court did not intend to compel production of such information becomes even more apparent by an examination of the municipal equivalent of the "open-meeting law." *General Laws* c. 39, § 23A relates to meetings of boards, commissions, committees and subcommittees of any district, city or town, and is practically a duplicate of the State law tailored to meet local circumstances. In March, 1964, an amendment to c. 39, § 23A was approved, which amendment provided specifically that "[i]n any matter requiring a vote of the board, the vote

shall be by voice or roll call vote, and no secret or written ballot shall be used." Thus, the "open-meeting law" applicable to municipalities does contain an express prohibition against the use of secret ballots.

The most recent amendment to the law applicable to State boards was approved in July, 1964, some four months after the Legislature included the prohibition against secret ballots in c. 39, § 23A. A similar prohibition was not placed in the State "open-meeting law." Since it is clear that the General Court is aware of the problem, having dealt with it on the municipal level so recently, the fact that secret ballots have never expressly been prohibited by c. 30A, § 11A must be considered an indication that the Legislature does not at this time desire to bind State boards in such a fashion.

The General Court has been faced with the problem of reconciling the desire to keep the public fully informed of the activities and decisions of public officials and the sometimes competing desire to protect such officials from having their votes influenced by public or private pressure. The General Court has apparently chosen to emphasize the former interest in the municipal sphere, and the latter interest on the State level. That the Legislature has treated the two levels of government in different ways is obvious from the use of different language in the applicable statutes, each of which was re-studied by the General Court in 1964. Accordingly, it is my opinion that the laws of the Commonwealth contain no prohibition against the decision made by the trustees of the University of Massachusetts to select the location of the new medical school by means of a secret ballot.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The State Board of Retirement should continue to hold the accumulated total deductions credited to an employee's account until full restitution is made by the employee, following his final conviction of an offense involving funds of any governmental unit.

JULY 20, 1965.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General, Chairman, State Board of Retirement.*

DEAR SIR:—I am in receipt of your letter of June 24, 1965 wherein you request my opinion concerning the disposition of the accumulated total deductions credited to the State Employees' Retirement System account of a former employee of the Massachusetts Maritime Academy.

You recite the following facts: On September 28, 1961, Norma J. Crowell, a former employee of the Massachusetts Maritime Academy, was found guilty in U.S. District Court for the District of Massachusetts of the offense of "... forging signatures on checks drawn on a Massachusetts Maritime Academy account ... in violation of 18 U.S.C. Section 495."

Subsequently, the State Board of Retirement withheld and is still withholding the accumulated total deductions credited to her account as provided in G. L. c. 32, § 15. The Board of Retirement has held no hearing on this matter.

The Division of State Colleges has requested that the account be transferred as a reimbursement to the Maritime Academy. Miss Crowell has again requested that the money be returned to her.

In my opinion, neither Miss Crowell nor the Maritime Academy is entitled at this time to the funds in question.

Section 15(3) states in part:

"In no event shall any member after final conviction of an offense involving the funds of any governmental unit . . . be entitled to receive . . . a return of his accumulated total deductions . . . unless and until full restitution for any such misappropriation has been made."

Miss Crowell's request is governed by this part of § 15. In this section the Legislature has clearly specified that only upon full restitution by the member shall the Board refund the accumulated total deductions credited to such member's account. Thus, since Miss Crowell has made no such restitution, the Board of Retirement is clearly authorized to withhold the funds until she does make full restitution to the Academy.

There is nothing in c. 32 which would authorize the transfer by the Board of the funds in Miss Crowell's account to the Maritime Academy. Section 15, the only section relevant to the present case, states that the funds are to be withheld and does not provide for any transfer to any agency or department.

Part one of § 15 provides only that on the request of a "member charged with the misappropriation of funds" the Board shall hold a hearing and

". . . if the Board after the hearing finds the charges to be true, such member shall forfeit all rights . . . to a return of his accumulated total deductions to the extent of the amount so found to be misappropriated and to the extent of the costs of the inspection, if any, as found by the Board."

Here, as in part 3 of § 15, the Legislature has made provision solely for the withholding of funds from the employee and has not in any way set forth authorization for any transfer of such funds by the Board of Retirement.

Therefore, it is my opinion that the Board should continue to hold these funds "unless and until" Miss Crowell makes "full restitution" and that in no event should transfer of these funds be made by the Board to the Massachusetts Maritime Academy.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A regional school district cannot be organized for administrative purposes only; a well-planned construction program is required.

A regional school district may assess member towns at a flat rate for its share of construction costs for an elementary school to be constructed in another town within the regional district only where said flat rate assessment is made in accordance with the agreement between the towns comprising the school district.

JULY 20, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—In your letters of March 2, 1965 and March 25, 1965, you have asked my opinion concerning certain problems arising in connection with regional school districts. Your specific questions in this regard are as follows:

“(1) Under Chapter 71, sections 14 through 16 I of the General Laws, may a regional school district be organized for administrative purposes only since it does not at this time contemplate construction?”

“(2) Would it be possible under existing legislation for a regional school district (K-12) to assess at a flat rate (*i.e.* \$1.00) a member town for its share of construction costs for an elementary school to be constructed in another town within the regional district?”

Your letter of March 25, 1965 amplifies the second question by the following additional facts:

“Under the regional school agreement, Town A would pay the cost of the construction of an elementary school in Town A with the exception of a \$1 payment from Town B and a \$1 payment from Town C. Town B would pay the cost of the construction of an elementary school in Town B with the exception of a \$1 payment from Town A and a \$1 payment from Town C. Town C would pay the cost of the construction of an elementary school in Town C with the exception of a \$1 payment from Town A and a \$1 payment from Town B. Is this arrangement consistent with Chapter 71, sections 14-16 I of the General Laws?”

These two questions will be answered in the same order as they appear above.

THE EARLY ENACTMENTS PERTAINING TO DISTRICT HIGH SCHOOLS AND UNION SCHOOLS

As early as 1848, the General Court passed legislation permitting adjacent towns of not more than two thousand inhabitants to unite for school purposes.¹ After formation, in accordance with section 3 of that Act, the district school committee was authorized to determine the proper location for the schoolhouse. Where the member towns authorized the construction of a new schoolhouse, the building was, in lieu of an agreement to the contrary, supported, maintained and financed by the various towns in proportion to the amount each paid in county taxes. If construction was not approved, the school was required to be located in one of the towns forming the district.

¹ *St. 1848, c. 279.*

Section 1. Any two adjacent towns, having not more than two thousand inhabitants each, may form one high-school district, for establishing such a school as is contemplated in the fifth section of the twenty-third chapter of the Revised Statutes, whenever a majority of the citizens of each town, in meetings called for that purpose, shall so determine.

Section 2. The school committees of the two towns, so united, shall elect one from each of their respective boards, and two, so elected, shall form the committee for the management and control of such school, with all the powers conferred upon school committees and prudential committees.

Section 3. The committee, provided for in the foregoing section, shall determine the location of such schoolhouse as shall be authorized to be built by the towns forming such district, or authorize the location of such school alternately, in the two towns, whenever the towns shall not determine to erect a house for its permanent location.

Section 4. In the erection of any schoolhouse for the permanent location of such school, and in the support and maintenance of the same, and in all incidental expenses attending the same, the proportions to be paid by each town, unless otherwise agreed upon, shall be according to the proportions of such towns in the county tax.

In both §§ 3 and 4 of c. 279 of the Acts of 1848, a newly constructed schoolhouse was referred to in terms of "the permanent location." The use of this wording implied that where a new structure was not built, it was to be treated as merely a temporary location. With reference to the act as a whole, the formation of a high school district was not contingent upon the town's initial decision to build new facilities.

As amended, *St. 1848, c. 279*, §§ 1 through 4 were arranged and compiled as §§ 3 through 6 of c. 38 of the General Statutes of 1860. The amendments, with references to the present discussion, were only of minor significance. The population requirement of "not more than two thousand inhabitants each" appearing formerly in § 1 was amended to read, "having each less than five hundred families or householders." Any reference to "the permanent location" was deleted from § 3. This wording was retained in § 4.

In the Public Statutes of 1882, a compilation of the general statutes of the Commonwealth similar to that of 1860, the former provision of G. L. (1860) c. 38, §§ 3 through 6 were unchanged in substance, but formally became P. S. (1882) c. 44, §§ 3 through 6.

Under §§ 10 and 11 of c. 44 of the Public Statutes of that year, towns were authorized to unite in establishing union schools. No direct reference appears in these sections limiting such schools to educational institutions below the high school level. The "management," "control," "location," proportion of the expenses each town must bear, "support," and "maintenance" were governed by the same provisions controlling district high schools. The formation of union schools was not limited, as were district high schools to those towns of less than five hundred families, but was restricted by the requirement of serving only contiguous areas.

The Revised Laws of Massachusetts (1902) retained without amendment the provisions of P. S. (1882) c. 44, §§ 3 through 6, as well as §§ 10 and 11 pertaining to high school districts and union schools discussed above. These sections were, nevertheless, organized under a new heading, R. L. (1902) c. 42, § 4 through 8.

In 1918, subsequent changes were proposed pursuant to §§ 176, 177 and 178 of c. 257 of the Acts of that year. Section 6 was amended to provide that the district school must obtain the approval of the board of education in determining the location of the school building. There were also certain additional amendments: the cost of transporting pupils was to be included within incidental expenses; the reimbursement of the town in a union in which the high school was located was permitted at the same rate as if it maintained a high school of its own; reimbursement to the other towns was at the same rate that they would have enjoyed had they been required to pay tuition for pupils attending a high school in another town.

The succeeding year provided still further amendments. St. 1919, c. 292 amended § 4 to read "union high school district" instead of merely "high school district."² The formation of such a district was made subject to the approval of the board of education. Section 8 was amended to provide that in the future union schools were under the control and supervision of the member school committees rather than, as was the case with the union high schools, the district school committee.

The amendments of 1918 and 1919 were immediately superseded by the General Laws of Massachusetts (1921) c. 71, §§ 14 through 16. These provisions were identical with those appearing in the later tercentenary edition (1932).³

² St. 1919, c. 292.

Section 1. Chapter forty-two of the Revised Laws is hereby amended by striking out section four and substituting the following:—

Section 4. Two or more towns may vote to form a union high school district, subject to the approval of the board of education, for the purpose of establishing and maintaining a high school.

Under the 1921 revision, two or more towns could form a union high school district with the approval of the department of education. Management was vested in the district committee comprised of one member elected from the school committee of each participating town. The "situation" of the school was determined by the district committee but again required the approval of the department. The ratio paid by the participating towns for the building and maintenance of a permanent schoolhouse was, unless otherwise agreed, in proportion to the respective county taxes.

³ Chapter 71 (Tercentenary Edition).

Section 14. Two or more towns may vote to form a union high school district, subject to the approval of the department, for the purpose of establishing and maintaining a union high school. The management and control of such school shall be vested in a committee, with all the powers of school committees, composed of one member elected by and from the school committee of each constituent town. The committee shall, with the approval of the department, determine the situation of the schoolhouse. The proportion payable by each town for the erection and maintenance of a permanent schoolhouse and for the support of the school, including the transportation of pupils to such school when necessary, unless otherwise agreed, shall be according to its proportion of the county tax.

Section 15. Every town where a union high school is situated shall be reimbursed by the commonwealth for the sums contributed to the support of such school to the same amount and under the same conditions as if said sums had been expended to maintain a local high school. Each other participating town shall so be reimbursed

to the same amount and under the same conditions as if its contribution had been expended for the tuition of its pupils in another town.

Section 16. Two or more towns may severally vote to establish union schools for the accommodation of such contiguous portions of each as may be agreed upon. The management and control of such schools, the situation of the schoolhouses therefor, and the apportionment of the expenses of erecting such schoolhouses and of the support and maintenance of said schools, and of all expenditures incident to the same, shall be determined by the school committee of the participating towns.

Provision was made for union schools; *viz.*, union high schools, in § 16. The establishment of such schools was by vote of the towns and for the purpose of serving contiguous portions of each. The management and control, as well as the "situation" of such schools, were determined by the school committees of the member towns.

A brief summary might prove of some value at this point. By the statutory plan established in 1921, any reference in the general laws to district high schools had completely disappeared and was replaced by what were designated as union high schools. The minimum population requirements so prominent in former statutes were dropped. Towns of any size could join to establish both union high schools and union schools.

The approval of the board of education was needed both in the initial formation of a union high school district and with regard to determining the "situation" of the schoolhouse. No statutory definition of the word "situation" was provided. Geographical location, as well as condition of the physical plant may well have been included within that term. The actual erection of the new schoolhouse was described as "the permanent location." This wording might well have allowed the use of temporary facilities for an indefinite period.

A better argument might be made with respect to § 8 pertaining to union schools that new buildings were a *sine qua non* to their establishment. No reference is made in that section to permanent schoolhouses, nor is there any mention of the "situation of the schoolhouse." The section, however, is far from explicit on this point. As to both sections, it is clear that construction of new buildings was an important and contributing factor directly bearing on the establishment of such schools.

THE BUILDING ASSISTANCE COMMISSION AND THE PERTINENT STATUTES PERTAINING TO REGIONAL SCHOOLS

Construction costs must always be reviewed by those embarking on a program of creating new educational facilities and may, in a number of instances, be the sole deterrent militating against the formation of regional school districts. An added incentive aimed at increasing the popularity of regional school districts is provided by St. 1948, c. 645. The purpose of that legislation, as evidenced from its title, is to encourage their establishment. Supervision over this program and the carrying out of this objective were entrusted to the School Building Assistance Commission and its administrative assistants.

The tools which the Commission has at its disposal to achieve this goal are varied. Under § 4, the Commission may conduct surveys and studies relative to the formation of regional schools. In the same regard, it may

also provide legal, architectural and technical assistance. Of more direct consequence to the financial problems involved, are the provisions of §§ 6 through 9 providing for partial payment by the state of construction costs of projects approved by the Commission. Judicious use of this latter power might well determine the breadth of educational opportunity available to students in a regional school.

The act also provides, at least for the limited purpose of the statute itself, certain basic definitions. A "[c]onsolidated school" is defined as: "any school constructed or enlarged with the intent of eliminating one or more existing schools." No mention of construction or enlargement is used in defining a "regional school." A "[r]egional school" is defined as: "any public school established under any provision of law by the action of two or more cities or towns."

In the text of the original act, an "[a]pproved project" was defined as: "any project for the construction or enlargement of a school house. . . ." This definition was amended by c. 490 of the Acts of 1950 to provide that an "[a]pproved school project" shall mean "any project for the construction or enlargement of a regional school or consolidated school. . . ." The amendment makes no distinction between the enlargement of a regional school already built and established and a town school to be enlarged for future use by the district as a regional school.

In the same year that the Building Assistance Commission was formed, there was created under c. 82 of the Resolves of 1948, a special committee to investigate certain problems of education in the Commonwealth. This special commission was made up of members of the General Court, as well as persons appointed by the Governor. As part of its final report, it drafted and proposed an act in most respects similar to the present provisions of §§ 14 through 16 I of c. 71 of the General Laws. A working knowledge of that report is basic to the understanding of these sections.

The special commission, in addition to meeting with professional educators, visited the site of the first regional high school built in New England. The high school was located in a new structure erected to service six small communities. Before the construction of the regional school, four of the towns had small high schools. Individually they were as good as could be expected under unfavorable conditions. These schools, nevertheless, proved to be limited in "size, personnel, funds and tradition . . . [and proved] inadequate to furnish the kind of training demanded in these times."⁴ The formation of the regional school⁵ was a forward step providing the students with an enlarged curriculum, an up-to-date library and reading room, as well as adequate laboratory facilities.

From a firsthand observation of the problems involved, the special commission outlined certain objectives. One of these objectives was that of encouraging local activity leading to the formation of regional schools with modern standards of education. The regional school concept became largely identified with educational advancement and improved academic standards. Among the newer and expanded services envisioned were programs for the handicapped, vocational training, guidance aid, and

extracurricular activities, such as dramatics, musical organizations and school publications.⁶

⁴“Final Report of the Special Commission established to investigate and study certain problems of education in the Commonwealth” (Feb. 1949) at p. 6.

⁵Id. at p. 7 (footnote) “A regional high school is one sponsored, administered, and financed mutually by two or more towns.”

The special commission placed the establishment of regional high schools on a priority basis. The reason assigned for this was the failure of the small towns, individually, to equip young people with intellectual training requisite to cope with the complex problems of a modern world. The report of the special commission called the small local unit on the secondary level “obsolete.”⁷ This, in the judgment of the special commission, was a factor contributing to school drop outs, and denied basic educational rights by offering only a limited educational program.

In short, the primary purpose for establishing schools on a regional basis is to obtain for the individual pupil better educational opportunities and a broader academic program. As a step in achieving this end, the special commission proposed legislation similar to that adopted by the General Court (St. 1949, c. 638).

A subsequent special commission was established pursuant to c. 39 of the Resolves of 1950 to study educational problems. No major amendments were proposed or adopted with regard to regional school districts. The formation of the committee serves to illustrate, nevertheless, the immediacy of educational problems.

⁶Id. at p. 8, Appendix C at p. 38

⁷Id. at p. 14

By c. 214 of the Acts of 1954, a new § 14C was added to c. 71 of the General Laws. This section authorized member towns to sell, lease, or license school buildings, already constructed, to the regional school district. The section was **amended twice the following year**. The first of these amendments permits school property to be leased for a maximum period of forty years. The second allows the school district to purchase, lease, or license school buildings, as well as any needed land appurtenant thereto.

The same year, 1955, § 16, subsections (c) and (d), was amended to provide that the regional school district could, in addition to those powers already enjoyed, remodel and make extraordinary repairs to a school or schools for the benefit of the towns comprising the district. Provision was also made enabling the district to incur debts for this purpose. The provisions of § 14C and these subsections give to the regional school district a certain amount of flexibility in planning and creating an effective school plant.

THE PRESENT PROVISIONS OF THE GENERAL LAWS RELATING TO THE ESTABLISHMENT OF A REGIONAL SCHOOL DISTRICT

A certain amount of background is essential to answering your immediate question. This has been discussed at length in the preceding paragraphs. The present provisions of c. 71 dealing with regional school districts can be understood only in light of this statutory history. It

should be borne in mind from this prior discussion that fundamental to these provisions is the decision by a group of towns to establish a regional school or schools—a concept well defined by the special committee formed in 1948 to study educational problems. Mindful of this, the present provisions must be reviewed.

Sections 14 through 20 of c. 71 of the General Laws contain those provisions relative to the establishment of a regional school district. Under § 14 of that chapter, individual towns may create regional school planning committees composed of three members. Where this preliminary step has been taken, the committees of two or more towns may join to form a regional school planning board and, as such, adopt a formal organization with a chairman and treasurer.

Once created, it becomes the duty of the planning board to study the feasibility of establishing a regional school district.

C. 71, § 14A of the General Laws

“It shall be the duty of the regional school district planning board to study the advisability of establishing a regional school district, its organization, operation and control, and of constructing, maintaining and operating a school or schools to serve the needs of such districts; to estimate the construction and operating costs thereof; to investigate the methods of financing such school or schools, and any other matters pertaining to the organization and operation of a regional school district; and to submit a report of its findings and recommendations to the selectmen of the several towns.”

Added St. 1949, c. 638, § 1, as amended St. 1951, c. 331, § 2.

Pursuant to the section cited above, the advisability and estimated cost of constructing new facilities are factors to be considered. These are not, however, the only considerations. In addition, the board must also determine the proper “organization, operation and control” of a proposed district and plan as well for the maintenance and daily running of the physical plant.

A planning board, in order to comply with this section, must thoroughly evaluate the needs of the community and determine whether new facilities are necessary for a modern school system. An extensive inquiry is required by § 14A. Anything less would not live up to the standards set by this section.

Where the planning board recommends, after conducting this exhaustive study, that a regional school should be established, it must draw up an agreement pursuant to § 14B for submission to the various towns. Under subsection (d), the proposed method of apportioning school construction costs is one of the terms to be included in the agreement. Copies of this agreement must be submitted to and approved by the Emergency Finance Board, as well as the Department of Education.

Having taken these steps, the matter of accepting §§ 16 through 16I as well as the agreement must be presented to the voters of the individual towns. The question printed on the ballot must be substantially similar to the form appearing in § 15. This form refers to the construction of a regional school by the district as an item to be included

on the ballot. Where a majority of the voters have passed favorably on this matter, the proposed regional school district is deemed to be established.

The powers and duties of the school district once established are found in § 16. Under subsection (c), the district may acquire suitable land for purposes of a school site. The district may also "construct, reconstruct, add to, remodel, make extraordinary repairs to, equip, organize, and operate a school or schools for the benefit of the towns comprising the district. . . ." Pursuant to subsection (d), the district may incur needed expenses with the approval of the towns for those purposes. Where necessary, a school district in accordance with § 14C is authorized to buy, lease or license school buildings from a member town.

It might be speculated whether construction was a condition precedent to the establishment of a regional school district. This would logically lead to a second related inquiry. If construction is a condition precedent, how much construction is necessary to comply with the statute? The standard is qualitative not quantitative. This line of reasoning would prove unfruitful in the present instance. No artificial criterion was intended in the provision of § 14 through § 16I of the General Laws. The fact in the present instance that no construction is presently contemplated is a strong, if not overriding consideration, indicating a failure to take those steps requisite to establishing a regional school system.

One can conceive of a situation where the building of new facilities would not be necessary. Such an instance would be where a town had undertaken and completed a building program geared to increasing the academic facilities only to have a large factory employing many inhabitants move to a new location the next year. In such a circumstance as this, it would be imperative upon that town to band together with neighboring towns to maintain the new facilities. It would seem improvident in such a case to require some additional construction in order for the communities to establish a regional school district.

As a practical matter, outside of an exceptional situation, it is hard to envision a situation in which the establishment of a regional school district would not require a well-planned construction program.

In answer to question one, in light of this lengthy discussion, it is my opinion that a regional school district cannot be organized for administrative purposes only. Instituting an administrative reorganization does not establish a regional school district. In order to create such a district the communities must comply in every respect with the provisions of G. L. c. 71, §§ 14-16 I and should fulfill as far as possible those goals discussed by the Special Committee on Education in its report filed in February of 1949.

The second question raises a problem distinct from the first. There is, however, this similarity: The towns in joining together must establish a regional school district. What that entails has been discussed in answer to question one. It is because such a district is created that the communities benefit from the higher reimbursement under St. 1948, c. 645, § 9 and enjoy the added 15% under G. L. c. 70, § 3B. The old,

however, may not be retained in the guise of the new. Certain supervisory powers are given to the Commissioner of Education in G. L. c. 71, § 14B and to the Building Assistance Commission pursuant to St. 1948, c. 645 to prevent such a result.

Regional school districts are empowered pursuant to subsection (h) of § 16 "[t]o assess member towns for any expense of the district." This subsection does not stand alone. The assessing power is integrally related to the power of the district to incur debts and, further, to the vital matter of the district's annual budget.

Under subsection (d) of § 16, the district may incur debts for the purpose of acquiring land and constructing new school buildings. Any such debt may not exceed a sum approved by the emergency finance board. Notice of the proposed debt must be given to the selectmen of the member towns. A town meeting may be called within a thirty-day period for the purpose of approving or disapproving the debt. If one town disapproves, the expense may not be incurred and a new proposal must be presented by the district school committee and acceptance obtained by means of the same procedure.

Under § 16B, the regional school committee must annually ascertain the amount of money needed to maintain the school system and the sum necessary to pay all debts coming due during the ensuing year. The share of the annual budget that an individual town would be required to pay for construction costs to the school district would, as stated in § 16, be calculated on the basis of the agreement between the member towns. In the same manner, the assessment must also be governed by that agreement. It may well be that under a given agreement the towns have decided that the cost of school construction should be apportioned on the basis of a flat rate as outlined in your letter of March 25, 1965.

In answer to question two, on the basis of the sections cited above, it is my opinion that a regional school district may assess member towns at a flat rate for its share of construction costs for an elementary school to be constructed in another town within the regional district only where said flat rate assessment is made in accordance with the agreement between the towns comprising the school district. It is for the towns to work out between themselves the amount each will contribute to construction costs. The fact the amount agreed upon is expressed in terms of dollar amounts instead of a mathematical ratio or proportion would not invalidate that part of the agreement.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The suspension of an officer or employee is not effected by a finding of guilty; the suspensions continue. The appointing authority, if he desires to oust such person, must take affirmative steps in accordance with the statutory provisions applicable to such individual or position involved, including notice and hearing.

JULY 23, 1965.

HON. THEODORE W. SCHULENBERG, *Commissioner, Department of Commerce and Development.*

DEAR MR. SCHULENBERG:—On May 3, 1965, you requested my opinion relative to the application of G. L. c. 30, § 59, the so-called Perry Law, to Mr. James F. Reynolds, the suspended Deputy Commissioner of the Department of Commerce and Development. Following the return of an indictment against him by a special Suffolk County Grand Jury for violations allegedly committed while holding the office of Deputy Commissioner, Mr. Reynolds was suspended—pursuant to the provisions of c. 30, § 59—by then Commissioner of Commerce, John T. Burke.

Mr. Reynolds was found guilty on January 15, 1965 of larceny from the Commonwealth, and was ordered to make restitution. He has now restored the amount taken to the Commonwealth. In light of the above, you have asked four questions relating to Mr. Reynolds' present status with the Department of Commerce and Development.

"1. Since Section 59 of Chapter 30 reads that Mr. Reynolds may be suspended during the pendency of the indictment, what happens to the suspension when he is found guilty?

"2. Does the suspension continue in effect after the finding of 'guilty'?

"3. Must affirmative steps be taken to remove Mr. Reynolds from office and, if so, just what steps need be taken?

"4. If affirmative action is necessary to remove Mr. Reynolds, is he entitled to notice and hearing?"

The parts of the Perry Law which are pertinent to the problems which you have posed are as follows:

"An officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court, may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, if he was appointed by the governor, be suspended by the governor, whether or not such appointment was subject to the advice and consent of the council or, if he was appointed by some other appointing authority, be suspended by such authority, whether or not such appointment was subject to approval in any manner. . . .

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his

suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement."

Thus the General Court has developed a method by which public officers and employees in whom public confidence has been threatened by reason of the return of indictments against them may be suspended from their positions for the period during which they are under suspicion.

The Perry Law contains no specific provision relative to the effect of a conviction upon the status of a suspended official. Rather, the Legislature concentrated its attention upon those indicted officials and employees who are ultimately acquitted, or whose criminal proceedings terminate in some fashion without a final finding or verdict of guilty. Consequently, conclusions as to the effect of a final judgment of guilty upon a Perry Law suspension must be based upon the general tenor of the statute and upon a determination of what the Legislature sought to accomplish by its enactment.

The General Court has provided for the temporary removal from the state governmental service of those officers and employees whose circumstances are such that it is desirable from a public viewpoint that their employment be interrupted. The return of an indictment against a state official or employee must inevitably cause a loss of public confidence in the ability of such official or employee to perform his duties in a proper and effective manner. Likewise, should the allegations of wrongdoing upon which the indictment is based be proven to be true, the Commonwealth may be spared further injury at the hands of the unreliable employee during the period between indictment and conviction. It is hardly open to argument that the Commonwealth benefits from provisions which authorize the suspension of suspected employees until proper judicial proceedings establish their final guilt or innocence.

Considering the obvious purposes of the statute, it is my opinion that the General Court never intended that conviction should constitute a ground for restoration of the guilty party to the public service. If suspicion of guilt warrants suspension from state office or employment, surely proof of such guilt should not be cause for terminating the suspension. I am aware that the first paragraph of the statute provides that an officer or employee may be suspended "during any period such officer or employee is under indictment," and that an indictment as such is technically dissolved upon conviction. Nevertheless, I am convinced that the General Court did not intend the language quoted above to defeat the purposes of the statute as a whole.

An interpretation of the Perry Law to the effect that conviction operates to terminate a suspension would be entirely contrary to the purposes for which the statute was enacted.

"But a strictly literal construction of a statute is not necessarily to be adopted if the result of adopting it will be to thwart or hamper the accomplishment of the obvious purpose of the act and if another interpretation which will not have such effect is possible." *Frye v. School Committee of Leicester*, 300 Mass. 537, 538; *Kneeland v. Emerton*, 280 Mass. 371, 376

The Supreme Judicial Court has consistently held that the object of

statutory construction is the ascertainment of the true intentions of the Legislature. The reason for enactment of the statute must be regarded. "If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat the purpose." *Lehan v. North Main Street Garage, Inc.*, 312 Mass. 547, 550; *Cullen v. Mayor of Newton*, 308 Mass. 578, 583-584.

It would appear that the Legislature intended that a suspension be removed only in the event of a failure to find the officer or employee guilty. It is specifically provided: "If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed. . . ." By expressly mentioning specific grounds for removal of a suspension imposed under the Perry Law, the General Court has implied that there shall be no other grounds for removal. *Spence, Bryson, Inc. v. China Products Co.*, 308 Mass. 81, 88.

Such a construction is consistent with the purposes which the statute was enacted to serve.

Accordingly, it is my opinion—in response to your first two questions—that the finding of guilty entered by the Superior Court on January 15, 1965 has no effect upon the suspension imposed the previous June upon Mr. Reynolds, and that the said suspension continues in full force and effect.

However, the Perry Law cannot be read so as to provide that conviction operates to effect an automatic removal of the officer or employee in question. If an appointing authority wishes to remove a suspended employee, he must—even after conviction—take affirmative steps to oust the guilty party. Such action must be in accordance with whatever statutory provisions may happen to relate to the individual or to the position affected. If, for example, a civil servant is involved, the appointing authority must follow the removal procedures set forth in c. 31 of the General Laws. Presumably, the fact of conviction can be offered as a cause warranting removal.

The record in the case of *James F. Reynolds v. Commissioner of the Department of Commerce and Development* [Suffolk Superior Court, 603, 682], currently awaiting presentation on appeal to the Supreme Judicial Court, reveals that Mr. Reynolds is a veteran who has held an appointive position in the service of the Commonwealth for more than three years. Consequently, he is entitled to the protection guaranteed him by G. L. c. 30, § 9A.

"A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office . . ., and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. . . ."

Therefore, it is clear that Mr. Reynolds can ultimately be removed only after notice and a hearing, in accordance with the requirements of the civil service law. In the absence of such removal proceedings, however, the suspension imposed upon Mr. Reynolds in June, 1964 remains fully in effect.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Hearing Examiner of the Department of Public Works is an officer whose appointment is subject to the approval of the Governor and, therefore, is within the exceptions provided in c. 31, § 5 M.G.L., and is not subject to civil service commission rules.

JULY 26, 1965.

HON. DONALD R. DWIGHT, *Acting Commissioner of Public Works*.

DEAR COMMISSIONER DWIGHT:—I am in receipt of your request of July 1, 1965, asking my opinion whether an appointment to the Office of Hearing Examiner in the Department of Public Works can be made without regard to the civil service provisions contained in c. 31 of the General Laws.

The position of Hearing Examiner in the Department of Public Works was established by c. 821, § 1 of the Acts of 1963, now contained in M.G.L.A. c. 16, §§ 1, 2, 3, 4, 5. The relevant portion is c. 16, § 5(b), which reads in part as follows:

“[The commission] shall act as a board of contract appeals, and shall approve or disapprove all claims made under any contract with the department. To assist the commission in performing this function, the commissioner with the approval of the governor shall appoint a person of legal training and experience, who shall be a member of the bar of the commonwealth, to the position of hearing examiner, and may remove him for cause in like manner. The hearing examiner shall receive a salary of fourteen thousand dollars and shall devote his entire time during business hours to the duties of his position.”

The section goes on to provide that the hearing examiner shall conduct hearings, make reports, and file recommendations. He can summon witnesses and require the production of books and records.

Chapter 16, § 4 provides in part that:

“The commissioner shall appoint and may remove all the employees in the department under the public works commission. *Unless otherwise provided by law*, all such appointments and removals shall be made in accordance with chapter thirty-one. . . .” [Emphasis supplied.]

Section 4 of c. 31 provides in part that:

"The following, among others, shall be included within the classified civil service by rules of the commission:

"The labor service of the state department of public works. . . ."

The position of hearing examiner would therefore appear to be under ordinary civil service rules unless exempted by some other provision of c. 31.

Such an exemption appears in § 5 of c. 31. This section is entitled "Positions not subject to civil service commission rules," and provides that:

"No rule made by the commission shall apply to the selection or appointment of any of the following:—

. . . officers whose appointment is subject to approval or confirmation by the governor. . . .

The position of hearing examiner is therefore excepted from civil service commission rules inasmuch as the examiner is appointed by "the commissioner with the approval of the governor." [*supra*, c. 16, § 5(b).]

The determination as to whether the hearing examiner is an "officer" as opposed to an "employee" is controlled by the leading case of *Attorney General v. Tillinghast*, 203 Mass. 539. The question there involved was whether the position of assistant city auditor of New Bedford was an "office" or a "mere employment." In holding that the position of assistant city auditor was an "office," the court stated (203 Mass. 543) that:

"The holder of an office must have entrusted to him some portion of the sovereign authority of the State. His duties must not be merely clerical, or those only of an agent or servant, but must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by the law. A mere employee has no such duties or responsibilities. A public officer is one whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power whether great or small, and in whose proper performance all citizens irrespective of party are interested, either as members of the entire body politic or of some duly established subdivision of it. . . ." (citations omitted).

The *Tillinghast* rule has been cited and applied in a number of recent cases. In the following instances the rule was applied to classify an individual as an "officer" rather than an "employee": *Commonwealth v. Dove*, 215 Mass. 217, (Commissioner of Soldiers' Relief of Lawrence); *Warner v. Selectmen of Amherst*, 326 Mass. 435, (Fire Chief of Amherst); *Somers v. Osterheld*, 335 Mass. 24, (Superintendent of Monson State Hospital); *Commonwealth v. Oliver*, 342 Mass. 82, (Manager of Taunton Municipal Lighting Plant); *Yates v. Salem*, 342 Mass. 460, (police officer).

The duties of hearing examiner are not "merely clerical" or "those only of an agent or servant." In a very direct sense the hearing examiner

undertakes duties which "must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by the law." It is my opinion that the hearing examiner is an "officer" within the meaning of § 5 of c. 31.

The Hearing Examiner of the Department of Public Works is an officer whose appointment is subject to approval by the Governor. He, therefore, is within the exception provided by M.G.L.A. c. 31, § 5 and is not subject to civil service commission rules.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Board of Review is a separate authority within the Division of Employment Security, and, as such, has the power to appoint Review Examiners.

July 27, 1965.

HON. J. WILLIAM BELANGER, *Director, Division of Employment Security*.

DEAR MR. BELANGER:—I have received your letter of July 1, 1965, informing me of the two vacancies in the position of Review Examiner in the Division of Employment Security and requesting my opinion whether the appointing authority for this position is vested in you, as Division Director, or in the Board of Review. It is my conclusion that this authority resides in the Board of Review.

The relevant statutory provisions are as follows:

General Laws c. 151Z, § 41 provides in part:

"The board of review may appoint one or more examiners, selected in accordance with section nine K of chapter twenty-three. . . ."

General Laws c. 23, § 9K provides, in part:

"Subject to appropriation, the director may appoint and employ all deputy or assistant directors . . . officers, accountants, clerks, secretaries, agents, investigators, auditors and other officers and employees, necessary for the proper administration of chapter one hundred and fifty-one A. *All persons so appointed or employed shall be selected on a non-partisan merit basis, subject to chapter thirty-one [civil service] and the rules and regulations made thereunder. . . . The director shall fix the duties of all persons appointed and employed by him. . . .*" [Emphasis supplied.]

General Laws c. 23, § 9N(b) provides in part:

"There shall be in the division a board of review consisting of three persons to be appointed by the governor, with the advice and consent of the council."

The mandate of these sections seems clear: namely, that the Board of Review is a separate authority within the Division of Employment Security having certain specific powers, among which is the appointment of examiners. The power to appoint examiners is limited, for it must be

exercised in accordance with the directives of c. 23, § 9K. These directives appear in the italicized portion of the above quotation of that statute—*i.e.*, compliance with a merit system of selection and with the Civil Service Laws. Nowhere is there any indication of a legislative intent that the Director be empowered to appoint examiners. Indeed, the last-quoted sentence of c. 23, § 9K speaks only of those persons appointed by the Director (“all persons appointed and employed *by him*”). Thus, it seems clear that the General Court intended that the appointive powers of the Director not apply to each and every employee of the Division, especially when, as in the question you raise, another authority, herein the Board of Review, is given the right to appoint to certain positions.

In addition, this result is supported by general principles of statutory construction. It is well settled that a specific grant of authority takes precedence over a special grant, and that when there are two statutory provisions, one general and one particular, then the particular provision must prevail as an exception to the general one. *Clancy v. Wallace*, 288 Mass. 557. This rule of construction is stronger where, as here, the particular statute was later in time of enactment.

Thus, it is my opinion that the Board of Review and not the Division Director has the power to appoint Review Examiners.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The provisions of St. 1963, c. 822, § 9, amend and govern the operation of St. 1956, c. 718, § 4A, St. 1961, c. 590, § 4, and St. 1962, c. 728, § 12.

“Preliminary planning and engineering studies” as used in St. 1963 c. 822 § 9, is intended to include performance and payment for all activities and services required to comply with the appropriate laws of the Commonwealth and the United States of America, up to the point of formal adoption of orders of taking to acquire a right of way and the publication of specifications soliciting bids for highway construction contracts.

AUGUST 2, 1965.

HON. FRANCIS W. SARGENT, *Commissioner of Public Works*.

Re: *Ch. 822, Acts of 1963, § 9.*

DEAR COMMISSIONER SARGENT:—You have asked my opinion “whether or not title examination, appraisal and preliminary relocation survey studies constitute ‘preliminary planning and engineering studies’ as set forth in Section 9 of Chapter 822, Acts of 1963.”

The first paragraph of Section 9 of Chapter 822, Acts of 1963 provides:

“Excepting money required for preliminary planning and engineering studies, no money shall be expended under this act by the state department of public works for that portion of any project lying within

the town of Brookline or the town of Saugus, or the city of Boston, Cambridge, Lynn, New Bedford, Peabody, Revere, Somerville, or Springfield until the said portion is approved by the selectmen of the town of Brookline or the town of Saugus, or the mayor of Boston, Lynn, New Bedford, Peabody, Somerville, or Springfield, or the city manager of Cambridge or of Revere, as the case may be, or has been approved by the board of project review in the manner hereinafter prescribed."

The clause beginning the above-quoted paragraph excepting expenditures for preliminary planning and engineering studies from the requirement of prior community approval was essential to permit the Department of Public Works to submit proposed routes to interested communities or the Board of Project Review. The selection of a route by the Department of Public Works requires consideration of engineering and financial factors. The cost of a particular highway includes not only construction, but also the acquisition of the proposed right of way. Compilation of information on those fiscal matters is essential to the intelligent consideration of any route by all responsible public officials at all levels of government.

Chapter 79 of the General Laws set forth mandatory standards of administration of the exercise of the power of eminent domain delegated to the Department of Public Works by § 7, Chapter 81 of the General Laws. Section 6 of said Chapter 79 requires that an award of damages be voted by the responsible officers of a taking agency at the same time that they adopt an order of taking. Section 7A of said Chapter 79 requires that at least one appraisal be made in accordance with § 12 of said Chapter 79 before adoption of an award of damages pursuant to §§ 6 or 7.

Title 23 of the U.S. Code in Section 133 provides in part:

"(b) The Secretary prior to his approval of any project under Section 106 of this title for right-of-way acquisition or actual construction shall require the State Highway Department to give satisfactory assurance that relocation assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway."

It is apparent from the language quoted in the preceding paragraph that fulfillment of the conditions precedent to the approval of a highway project agreement by the Federal Government includes *inter alia* a survey of the number of families expected to be displaced and determination of the facilities which may be available to relocate them. The accelerated highway program of the Commonwealth is assisted materially by the financial participation of the Federal Government through the U.S.B.P.R. It is incumbent upon responsible public officials to comply with the provisions of Title 23 of the U.S. Code in preparing any highway proposal for approval as the subject of an highway project agreement between the United States and the Commonwealth of Massachusetts. Any failure of the Commissioners of the Department of Public Works to comply with Title 23 U.S.C., § 133(b) would materially increase the cost of an highway project and would *a fortiori* become a major factor in any "preliminary planning" of that project.

It is my opinion that the words "preliminary planning and engineering

studies" as used in § 9, Chapter 822, Acts of 1963 are intended to include performance and payment for all activities and services required to comply with the appropriate laws of the Commonwealth and the United States of America, up to the point of formal adoption of orders of taking to acquire a right of way and the publication of specifications soliciting bids for highway construction contracts.

It is my opinion that one of the purposes of § 9 of said Chapter 822, to wit the approval of proposed routes by local officials, would be frustrated if complete engineering and cost information could not be made available to those officials by the Department of Public Works. It is my further opinion that approval of the officials listed in § 9, Chapter 822, Acts of 1963 and in similar sections of some other highway bond issues is not a condition precedent to the expenditures of funds authorized and appropriated by said Chapter 822 for *inter alia* services rendered for the appraisal of property located in a proposed right of way, for examinations of and preparation of opinions on the ownership of said property to determine to whom damages should be paid, and for survey work to provide relocation assistance to those who would be displaced by taking the proposed right of way. Payments therefor from that fund should be processed routinely by the appropriate agencies of the Commonwealth.

You have also asked my opinion on whether the last paragraph of § 9, Chapter 822, Acts of 1963 amends appropriate previous highway bond issues so that the exception from prior approval of local authorities applies to expenditures for preliminary planning and engineering studies from funds made available by those earlier highway bond issues.

The last paragraph of § 9 of said Chapter 822 states:

"The approval and acceptance by a city or town heretofore required by general or special law before funds authorized for the accelerated highway program shall be expended by the state department of public works is hereby limited and modified by the provisions of this section."

It is my opinion that the General Court intended by this language to amend any general or special laws, existing at the time of the enactment of said Chapter 822 on November 15, 1963, to assure that the authority and procedures included in § 9 of said Chapter 822 would define and govern the circumstances under which the approval of local communities of proposed routes would be a condition precedent to the expenditure of funds made available by such highway bond issues. It is therefore my opinion that the provisions of Section 9 of Chapter 822, Acts of 1963 amend and govern the operation of § 4A of Chapter 718, Acts of 1956; § 4 of Chapter 590, Acts of 1961; and § 12 of Chapter 782, Acts of 1962.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The computation of a grant-in-aid upon certification by the commissioner of education is based on a given school year and these awards are paid only on the basis of the statistics for the school year preceding such certification. Hence, the city of Chicopee cannot now be granted any further state aid to education funds for the school years preceding 1964-1965.

August 4, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—I am in receipt of your letter of July 22, 1965, in which you request my opinion as to whether the City of Chicopee should be granted additional state aid to education funds for past years under C. 70 of the General Laws on the basis of the July 8, 1965 opinion of this office holding that children residing on the Westover Field Federal reservation are to be included within the geographical limits of Chicopee for purposes of such state aid to education.

It is clear that on the authority of our recent opinion on this matter Chicopee has the right to include children who reside on the Westover Field Federal reservation and who attend the Chicopee public schools in all present and future requests for state aid to education funds. Since the procedure as outlined in Chapter 70, Section 9 allows the commissioner to certify the amount due to each community up to December 31, Chicopee should receive reimbursement for this past school year of 1964-1965.

However, since Chapter 70 is quite explicit in the procedure for the granting of this financial aid, it is my opinion that Chicopee should not be awarded a further lump sum payment for any earlier school year.

Chapter 70, Section 3 states in part:

"The amount of such grant for each town shall be determined annually by the commissioner from the returns required by this chapter and by chapter seventy-two for the preceding school year . . ." [Emphasis added.]

Chapter 70, Section 9 states in part:

" . . . The Commissioner . . . shall, not later than December Thirty-first, certify to the commissioner of corporations and taxation and to the comptroller the amount due each town for payment by the state treasurer in the succeeding year. . . ."

Chapter 72, Section 3 requires that "The superintendent of schools shall annually on or before July Thirty-first transmit the school returns to the commissioner—containing the following information—:

"First. The number of persons between the ages of five and seven and the number between seven and sixteen residing in the town *on October first last preceding* the date of the certificate—

"Second. The net average membership of the public schools of the town *for the school year last preceding* the date of said certificate—

"Third. The amount of money raised by taxation by the town and expended *during the fiscal year last preceding said date*—

"Fourth. That the town has maintained *during the school year last preceding* the said date—

"Fifth. That the town has, *during said school year* complied—" [Emphasis added.]

It is evident from the above quoted provisions of chapter seventy and seventy-two that the grant for each year is to be considered as a separate transaction. The amount to be certified by the commissioner and granted by the commonwealth is to be computed only from the data filed in accordance with chapters seventy and seventy-two. This data is specifically limited to "the preceding school year" (C. 70 § 3; C. 72 § 3). There is no provision in either chapter that would authorize a disbursement from the Massachusetts School Fund computed from data which covered more than the single "preceding school year".

Therefore, since the computation of each grant upon certification by the commissioner is necessarily based on a given school year and since these grants can be awarded and paid only on the basis of the statistics for the school year preceding certification it is my opinion that Chicopee should not now be granted any further state aid to education funds for the school years preceding 1964-1965.

Having answered your first question in the affirmative, answers to your second and third inquiries are unnecessary.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Trustees of the University of Mass. are statutory overseers of the University, vested with the responsibility for its management, and cannot be considered "university personnel" under c. 75, § 32, M.G.L.

The Trustees are entitled to an allowance for reasonable expenses incurred in the performance of duty as authorized by General Laws c. 15, § 29, and c. 39, § 25.

Although the comptroller cannot actually direct that payments shall be withheld, he may report to the Governor and Executive Council that it is his opinion that certain charges are improper. Responsibility for deciding whether the request is to be honored is vested in the Governor and the Executive Council.

AUGUST 6, 1965.

DR. JOHN W. LEDERLE, *President, University of Massachusetts*.

DEAR DOCTOR LEDERLE:—You have requested my opinion relative to the reimbursement by the Commonwealth of certain travel expenses incurred by a member of the Board of Trustees of the University of Massachusetts. You have informed me that the trustee in question is at present employed by the United States Government in Washington, D.C. Consequently, in order to attend meetings of the trustees, he is compelled to travel both within and without the Commonwealth, and must pay the expenses of transportation.

The trustees as a body have determined that individual trustees should be allowed to travel to and from a residence outside of the Commonwealth, where such residence is maintained because of out-of-state employment, and that such trustees should be reimbursed for the same. However, the Comptroller of the Commonwealth has informally advised the trustees that he will decline to certify any account which includes an amount for expenses incurred outside of Massachusetts for the purpose of travel to and from trustees' meetings. Accordingly, you have posed the following three questions:

"1. Are expenses incurred by a trustee residing outside the Commonwealth because of employment outside the Commonwealth for travel between his place of residence and the place where a meeting of the trustees or of a committee of the trustees of which he is a member is held expenses which the trustees may determine under General Laws Chapter 75, Section 32, to be payable or reimbursable by the Commonwealth?

"2. If your answer to the first question is 'yes', may appropriations for the maintenance, operation and support of the university be disbursed in payment, or reimbursement, of such expenses on certification to the state comptroller in accordance with the provisions of General Laws Chapter 29, Section 18, as may from time to time be directed pursuant to General Laws Chapter 75, Section 8, by the trustees or an officer of the trustees designated by the trustees?

"3. If your answers to the first two questions are 'yes', may the state comptroller withhold the certification required by General Laws Chapter 29, Section 18 of a demand or account for such expenses submitted pursuant to General Laws Chapter 75, Section 8?"

Expenditure of funds for the University of Massachusetts is governed in part by G. L. c. 75, § 8, which section provides as follows:

"Notwithstanding any other provisions of law to the contrary, the general court shall annually appropriate such sums as it deems necessary *for the maintenance, operation and support of the university*; and such appropriations shall be made available by the appropriate state officials for expenditure through allotment, transfer within and among subsidiary accounts, advances from the state treasury in accordance with the provisions of sections twenty-four, twenty-five and twenty-six of chapter twenty-nine, *or for disbursement on certification to the state comptroller in accordance with the provisions of section eighteen of said chapter twenty-nine, as may from time to time be directed by the trustees or an officer of the university designated by the trustees.*" [Emphasis supplied.]

In addition, G. L. c. 75, § 32 governs University travel policy:

"The trustees shall have complete authority in determining the university's travel policy. Such power shall include the right to determine who *among university personnel* should travel within and without the commonwealth at state expense and where such personnel shall travel." [Emphasis supplied.]

The trustees have apparently applied the provisions of c. 75, § 32 to

themselves, and have authorized the travel arrangements referred to above.

In my opinion, however, such arrangements cannot be authorized by the trustees under the provisions of c. 75, § 32. This section refers to "university personnel," and is intended to relate to individuals who actually are employees of the University, and who may be called upon to travel in the performance of their duties. It is not applicable to the trustees themselves; the trustees are statutory overseers of the University, vested with responsibility for its management, and cannot be considered "university personnel" as such.

The section in question should be read together with c. 75, § 8, which section relates to the expenditure of funds in general. Section 8 provides that funds shall be appropriated and expended "for the maintenance, operation and support of the university." Expenditure for travel in the course of duty by University personnel is consistent with the enabling provisions of c. 75, § 8, since such travel can certainly be considered a part of the "operation" of the school. But it is clear that expenditures for such operation, as well as for "maintenance" and for "support," may lawfully be made only for the University and for its personnel. The intent of the General Court in enacting c. 75, § 8—as well as the related c. 75, § 32 with regard to travel policy—was to provide for the practical needs of the University. There is no indication that these sections were intended to be applicable to the general functioning of the trustees as well. Accordingly, in response to your first question, it is my opinion that the type of expense referred to in your letter is not subject to a determination under c. 75, § 32 that it should be payable by the Commonwealth. Likewise, since funds appropriated under c. 75, § 8 are similarly limited to use for specific University purposes, the answer to your second question must also be in the negative.

However, this conclusion does not of necessity preclude the trustee in question from being reimbursed for travel expenditures. Although the trustees may not lawfully seek reimbursement under c. 75, § 32, they may proceed under the provisions of c. 30, §25:

"... Such officers or members of departments whose duties require them to travel elsewhere than to and from the offices provided for them by the commonwealth, and *unpaid state officers or members of departments*, and those whose duties do not require daily attendance and who receive compensation by the day, *shall be allowed their actual reasonable expenses incurred in the performance of such duties, if such expenses are authorized by law to be paid by the commonwealth.* Bills for such expenses shall be itemized and the dates when, and the purposes for which, such expenses were incurred shall be stated before their allowance by the comptroller." [Emphasis supplied.]

The trustees serve without compensation [see c. 15, § 20] and clearly are within the category of "unpaid state officers" as that expression is used in the above-quoted section. Thus, the trustees are entitled to an allowance for reasonable expenses incurred in the performance of duty, "if such expenses are authorized by law to be paid by the commonwealth." General Laws c. 15, § 20 indicates that payment of such expenses is authorized:

“ . . . The appointive members shall serve without compensation, but their personal and incidental expenses shall be paid as are those of trustees of other public institutions.”

Accordingly, an individual trustee may—pursuant to c. 15, § 20 and c. 30, § 25—submit to the Comptroller itemized vouchers for reimbursement of travel expenses, which vouchers must indicate each item of expense, and the date when, as well as the purpose for which, such expenses were incurred. Presumably, submission of such a voucher is an implied representation by the trustee that he has determined in good faith that the expenditures referred to therein are reasonable. Whether travel from Washington, D.C. for the purpose of attendance at meetings of trustees of the University of Massachusetts is in fact reasonable is a question for resolution by the trustee himself and by the officers vested with the responsibility of reviewing the travel voucher.

Since the trustees may seek reimbursement under these sections, I will respond to your third question relating to the authority of the Comptroller of the Commonwealth to withhold certification of the travel vouchers. It is clear the Comptroller cannot refuse to process the voucher.

“The comptroller shall examine all accounts and demands against the Commonwealth. . . . The comptroller shall make a certificate specifying the amount due and allowed on each account or demand so examined, the name of the person to whom such account is payable, and the account to which it is chargeable; and if it appears to him that there are improper charges in said accounts or demands he shall report the same to the governor and council, with a separate certificate therefor. . . .”

Mass. G. L. c. 7, § 13.

Although the Comptroller cannot actually direct that payments shall be withheld, he may report to the Governor and Executive Council that it is his opinion that certain charges are improper.

Ward v. Comptroller of the Commonwealth, 345 Mass. 183, 186
O'Connor v. Deputy Commissioner and Comptroller,
1965 Adv. Sh. 329, 331

Accordingly, although the trustees are not authorized to submit requests for reimbursement for expenses of travel to trustees' meetings under c. 75, § 32, and cannot be reimbursed from amounts appropriated under c. 75, § 8, they may submit vouchers pursuant to c. 15, § 20 and c. 30, § 25. The Comptroller may not refuse payment himself, but he may recommend that the amounts requested not be paid. Responsibility for deciding whether the request is to be honored is—in the final analysis—vested in the Governor and the Executive Council. [See *Const. of the Comm.*, Pt. 2, c. 2, § 1, Art. XI; *Mass. G. L. c. 7, § 13.*]

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The Town of Berkley must provide transportation to pupils attending private high schools in Taunton, and this obligation is not met simply by paying a transportation allowance to the parents of those pupils. Chapter 71, § 7A, M.G.L., requires competitive bidding on contracts to transport school children.

AUGUST 10, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—I am in receipt of your request of July 1, 1965 for my opinion on three questions relating to whether the town of Berkley must provide transportation for six high school students attending approved parochial schools in the adjoining city of Taunton.

You state in your letter that Berkley has no high school and that the town sends its high school students to a regional high school in the adjoining town of Dighton. You also state that the Berkley School Committee provides bus transportation for these children to and from school in Dighton.

Chapter 76, § 1 of the Massachusetts General Laws provides in part that:

“Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in the curriculum.”

In the case of *Quinn v. School Committee of Plymouth*, 332 Mass. 410, the Supreme Judicial Court interpreted the above paragraph (at p. 412) as follows:

“... We think that by its enactment the Legislature intended to make available to children in private schools transportation to the same extent as a school committee within its statutory powers should make transportation available to children in public schools. . . . The question is not what the committee can be made to do. The requirement imposed is that there be no discrimination against private school children in what the committee in its discretion decides to do.”

The Court in the *Quinn* case went on to require that the Plymouth School Committee “provide transportation to [a parochial school in the adjoining town of Kingston] for pupils in grades III through VI to the extent that transportation is provided by the committee for elementary school pupils [who are sent to a public school in the adjoining town of Bourne].” The rule of this case was treated with in two previous opinions from this department (May 4, 1961 and November 2, 1961). A school committee must provide transportation to an out-of-town private school for pupils in the same grades as pupils whom the school committee transports to an out-of-town public school. The School Committee of Berkley is thus obliged to provide transportation for the six high school pupils who attend parochial school in Taunton.

A school committee is obligated to provide transportation for private school pupils to the same extent as for public school pupils even though the cost per capita may be greater for the private school pupils. The paragraph from c. 76, § 1, quoted above contains no exemption from possible financial hardship. Furthermore, c. 71, § 7A, (relating to state reimbursement for local school transportation outlays) provides in part:

"... that the amount of grant, per pupil, for transportation to private schools in towns which furnish such transportation, shall not exceed the amount of grant per pupil for transportation to public schools. ..."

This provision, by restricting the amount of grant from the state, assumes that in some cases a school committee may have to pay more per pupil for transportation to a private school than to a public school.

It should further be noted that c. 71, § 7A requires competitive bidding on contracts to transport school children:

"... no contract shall be awarded except upon the basis of prevailing wage rates, as hereinafter provided, and of sealed bids, and the school committee shall, in the event that a contract is awarded to other than the lowest bidder, file with the department a written statement giving its reasons therefor, which statement shall be open to the public inspection. ..."

As a result of this provision, a school committee could lose its right to state reimbursement if it seeks to discharge its obligation by paying a transportation allowance to the parents of school children instead of providing the actual transportation. Clearly, the payment of a transportation allowance violates the requirements of competitive bidding in such a way as to jeopardize state reimbursement. Chapter 71, § 7A further states that:

"... No expense incurred by a town for the transportation of pupils shall be approved by the commissioner for the purpose of such reimbursement, if it appears to him, after diligent inquiry, that such expense has been incurred ... pursuant to any contract awarded in violation of any provision of this section or of section four of chapter forty. ..."

To summarize then, it is my opinion that the town of Berkley must provide transportation to pupils attending private high schools in Taunton, and that this obligation is not met simply by paying a transportation allowance to the parents of these pupils.

Accordingly, I answer your first question in the affirmative and your second and third questions in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Step rate increases referred to in Section 47E of Chapter 31, M.G.L., can lawfully be granted solely to employees with permanent civil service status.

AUGUST 12, 1965.

HON. W. HENRY FINNEGAN. *Director, Civil Service Commission.*

DEAR SIR:—I am in receipt of your request for my opinion whether Sections 47C and 47E of Chapter 31 of the General Laws authorize the Director of Civil Service to approve annual step-rate salary increases for persons who are employed under those two sections but who do not have permanent civil service status.

Section 47C provides that certain municipal welfare employees shall be subject to the civil service laws contained in Chapter 31. Section 47E requires that:

“Persons holding positions referred to in section forty-seven C . . . shall be given an annual step-rate [salary] increase. . . .”

These provisions of Sections 47C and 47E of Chapter 31 are, however, limited by Section 20D of that same Chapter, which states:

“Except as otherwise expressly provided in this chapter . . . , no person shall be regarded as holding office or employment until he has been appointed to a permanent position in the official or labor service and has actually performed the duties of the office or position thereof for a probationary period of six months.”

Since Section 47E does not expressly provide otherwise, it is my opinion that the language of Section 20D prohibits step-rate increases for persons who are without permanent civil service status. To grant such employees step-rate increases would be to violate a basic principle of Chapter 31. A persons who holds a civil service position, but who does not have permanent status, is presumed to be holding that position on a provisional basis until a permanent appointment can be made. If a temporary employee could lawfully receive step-rate increases, the likelihood of a permanent appointment made under proper civil service procedures would be reduced. Step-rate increases for temporary employees would clearly conflict with the goal of a corps of permanent governmental employees envisioned by the General Court when the civil service laws were enacted.

Consequently, in light of the explicit provisions of G. L. c. 31, § 20D, and in accordance with the principles and objectives of the civil service system, it is my opinion that the step-rate increases referred to in Section 47E of Chapter 31 can lawfully be granted solely to employees with permanent civil service status.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The Board of Registration must determine whether given services conform to generally accepted concepts of professional engineering.

It is not legal for an unregistered person to represent himself as an Electrical Engineer, or any kind of an Engineer without including the adjective "professional", or to represent himself as an engineer without qualifications.

AUGUST 12, 1965.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MRS. SULLIVAN:—I am pleased to reply to your letter of June 22, 1965, in which you have submitted the following four questions to obtain clarification of § 81D of c. 112 of the General Laws.

“(1) Is it legal for an unregistered individual to represent himself as an Electrical Engineer?”

(2) Is it legal for an unregistered individual to represent himself as any kind of an engineer without including the adjective ‘professional’?

(3) Is it legal for an unregistered individual to represent himself as an engineer without qualification?

(4) If it is legal for an unregistered individual to represent himself as a Moving Engineer, but not legal to represent himself as an Electrical Engineer, is there any guide to indicate which intermediate courses of action are legal?”

The specific answers to your first three questions are, in my opinion, in the negative and—with respect to your fourth question—sections 81D and 81E of Chapter 112 provide the guides to indicate which intermediate courses of action are legal.

Section 81T states in part:

“Whoever practices or offers to practice engineering . . . without being registered in accordance with the provisions of this chapter, . . . or violates any of the provisions of sections eighty-one D to eighty-one S, inclusive, shall be punished by a fine . . . or by imprisonment . . . or both. . . .”

Section 81D states in part:

“A person shall be construed to practice or to offer to practice engineering who practices any branch of the profession of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer; or who holds himself out as able to perform, or who does perform any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering. . . .”

(1) It is, in my opinion, illegal for an unregistered individual to represent himself as an electrical engineer. Electrical engineering is a recognized branch of the engineering profession which is specifically included in § 81E as one of “the fundamental branches of engineering.” Thus, an unregistered individual who represents himself as an electrical engineer is clearly liable to the penalties of § 81T since he is, in the

language of § 81D quoted above, holding himself out "as able to perform . . . any engineering service or work . . . designated by the practitioner or recognized by educational authorities as engineering."

(2, 3) Similarly, an unregistered individual who represents himself as an engineer without adding the adjective "professional" or other qualification is liable to the penalties of § 81T, since by his unqualified representation he is holding ". . . himself out as able to perform . . . engineering service or work. . . ." (Section 81D).

(4) Nevertheless, I do not wish to leave the impression that use of the title "engineer" by an unregistered person will in all instances constitute a violation of the registration laws. The words "engineer" and "engineering" are used in a variety of contexts, and may at times be intended to refer to occupations quite unrelated to what was contemplated when the Legislature used the phrase "the profession of engineering."

Sections 81D and 81E of c. 112 indicate that the General Court was aware of the possibility of such generalized use of the term "engineering". Section 81D provides that "[a] person shall be construed to practice or to offer to practice engineering . . . who holds himself out as able to perform, or who does perform any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering. . . ." And 81E states: "The board, for the purpose of registration of professional engineers, shall recognize all the fundamental branches of engineering. . . ." Accordingly, it is clear that the registration statutes are not meant to apply indiscriminately to all persons who may happen to make use of the word "engineering." Rather, they are applicable to those individuals who actually provide skilled professional services for which substantial technical training is a requirement.

The Board of Registration of Professional Engineers and of Land Surveyors must—in each instance—determine whether a given type of "engineering" is subject to the registration laws. Such a determination should be made on the basis of what the public in general and the profession in particular considers to be professional engineering. Clearly, the services of an electrical engineer do conform to the general concept of the activities of a trained professional engineer. On the other hand, a so-called "moving engineer," who—despite use of the title "engineer"—performs services that are non-technical in nature—would not generally be thought of as a trained technician, and would not be obliged to seek registration. In the last analysis, it is the Board of Registration itself which must determine whether given services conform to generally accepted concepts of professional engineering. Should the Board decide that a given occupation is not within one of "the fundamental branches of engineering," and that the individuals in question do not perform services ordinarily recognized as engineering, such individuals could not "be construed to practice or to offer to practice engineering" as defined in c. 112, § 81D and would therefore not be subject to the sanctions of c. 112, § 81T.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Total gross receipts is a concept which is significantly different from that of net receipts ultimately received by the individual who is a promoter of a fight.

The right to levy and to collect taxes is inherent to the sovereign power of the Commonwealth. This authority cannot be limited in any way even by the acts of the agents of the Commonwealth. Short of legislative relief, the representations of former members of the Massachusetts State Boxing Commission cannot be used as a defense to claims by the Commonwealth for the payment of back taxes lawfully owed.

AUGUST 12, 1965.

HON. HERMAN GREENBERG, *Chairman, Massachusetts State Boxing Commission.*

DEAR MR. GREENBERG:—I have received your letter of July 15, 1965, wherein you request an interpretation of § 40A of c. 147 of the General Laws, (which section provides for the so-called Boxers' Fund). The Fund is supported by taxes imposed upon professional boxing matches and exhibitions conducted within the Commonwealth.

"Every licensee holding or conducting any professional, boxing or sparring match or exhibition shall, within seventy-two hours after its conclusion, pay to the state treasurer, in addition to the payment required under section forty, a sum equal to one per cent of *the total gross receipts from the sale of tickets or from admission fees or from television or broadcasting rights*. . . . Said sum shall be credited by said treasurer to a fund to be known as the boxers' fund, which shall be administered by the boxers' fund board for the use and benefit, including funeral expenses, of boxers or former boxers in need of assistance. . . ." [Emphasis supplied.] Mass. G. L. c. 147, § 40A, as amended by St. 1964, c. 367. Thus, the licensee is made responsible for the payment of the taxes referred to in this section. And the General Court has specifically provided—in the second paragraph of the statute—that "[t]he commission [the Massachusetts State Boxing Commission] shall enforce the provisions of this section."

You have informed me that a controversy developed early in 1960 in connection with the application of this section to the Paul Pender—Ray Robinson fight of that year. At that time, the Commissioners ruled that the one per cent tax imposed by § 40A for purposes of the Boxers' Fund need be paid only on the amounts actually received by the licensee, rather than upon the gross receipts from the sources indicated. Since then, licensees have continued to pay the one per cent tax solely on what they have actually received, with the balance of the receipts remaining unaffected by the tax provisions of § 40A.

In light of these circumstances, you have requested my opinion upon the following two questions:

"1. Is the amount of money paid to the Boxers' Fund to be taken from that part of the money actually received by the licensee or from the total amount of money paid for television or broadcasting rights?

"2. In the event that the ruling is that the money paid to the Boxers' Fund from the television or broadcasting rights should have been coming from the total amount received for such rights, is the licensee (Sam Silverman in this instance) required to make up the difference in money (\$3,766.25)?"

General Laws c. 147, § 40A refers to "a sum equal to one per cent of the total gross receipts from the sale of tickets or from admission fees or from television or broadcasting rights. . . ." [Emphasis supplied.] Use of the phrase "the total gross receipts" is an unmistakable indication that the General Court intended that all of the sums derived from the source referred to in the section be subject to taxation for purposes of the Boxers' Fund. "Total gross receipts" is a concept which is significantly different from that of net receipts ultimately received by the individual who is promoting the fight.

To rule otherwise would be to vest in the licensee power to affect the amounts to be received in taxes by the Commonwealth. A licensee usually receives a relatively small percentage of gate or television receipts—12½% is a familiar figure—and he can, of course, reduce that figure even further. If only the licensee's receipts were to be taxed, the Commonwealth would be limited to taxing only a small portion of total receipts, and could be restricted even further by agreements entered into by the licensee which result in his receiving smaller shares of income from admissions or from television. I do not believe that the Legislature intended to impose a tax which could be affected to such an extent by private agreement.

The fact that the licensee is made responsible for the payment of the tax imposed by the section does not mean that only the licensee's net receipts are taxable. Administrative convenience makes it desirable that a single individual be responsible for payment, and that the Commonwealth's agents not be compelled to seek shares of the tax from each of the several groups or individuals who usually divide receipts from boxing matches. The licensee is, of course, free to contract with the other interested parties so that they may contribute a fair share of the tax obligation. But this is a matter for private agreement. The General Court has clearly provided that the tax referred to in § 40A is to be imposed upon total gross receipts; accordingly, the Commonwealth is entitled to collect the specified tax upon 100% of what is received, not merely a tax upon 12½% or some other less significant figure arbitrarily arrived at by means of private contract.

It follows, therefore, that taxes were collected in 1960 and in succeeding years at a rate which is lower than that specified by G. L. c. 147, § 40A. The question thus arises whether the Commonwealth may—at this time—take steps to recover the difference between the amounts that were paid and the amounts which actually were owed.

I am aware of the fact that agents of the Commonwealth—in this case, the members of the Massachusetts State Boxing Commission—have represented to the licensee that the taxes in question are payable solely upon the amounts that he (the licensee) has received. The licensee has relied upon the Commission's interpretation and calculations, and has paid the amounts requested. In addition, the licensee now no longer has

the opportunity to contract with the fighters and other parties so that the extra tax burden may be more equitably shared.

Nevertheless, the right to levy and to collect taxes is inherent to the sovereign power of the Commonwealth. This authority cannot—in my opinion—be limited in any way, even by acts of the Commonwealth's agents. The United States Supreme Court has consistently ruled that neither the State nor the Federal government can be estopped upon matters which are a part of its governmental, as opposed to its proprietary, functioning. *Pine River Logging Company v. United States*, 186 U.S. 279, 291

Although a government may well be estopped by authorized acts of its agents, it is clear that actions or representations which are beyond the scope of such agents' authority cannot prohibit the exercise of lawful governmental powers. *Ritter v. United States*, 28 F.2d 265, 267 (U.S.C.A., 3rd Cir.)

Past members of the Massachusetts State Boxing Commission were without authority to reduce or otherwise compromise the claims of the Commonwealth for taxes imposed by G. L. c. 147, § 40A. Consequently, representations of the kind made by the Commission cannot prevent the Commonwealth from proceeding to recover what is owed. The Supreme Court of Colorado has had occasion to consider a set of facts similar to those presently at issue, and to apply the principles discussed above. In *Bennetts, Inc. v. Carpenter*, 137 P.2d 780, 782, that Court ruled upon the effect of an opinion by the Director of Revenue that a restaurant company would not be liable for a sales tax in connection with meals sold in cafeterias maintained in arms plants. In accordance with this advice, the company did not collect a sales tax upon the meals in question. The Court held, nevertheless, that the Director was not estopped to assert the company's liability for the uncollected tax.

With regard to the petitioner's contention that it was entitled to rely upon the advice of the Director, the Court commented, at page 782:

"... At first glance it would seem this position has merit and certainly a contrary rule not infrequently results in some measure of injustice, *notwithstanding which stern necessity has compelled its universal adoption*. Were it otherwise the state's servants could waive most of her revenue. 'It is a general principle of law that the doctrine of estoppel cannot be invoked against any governmental agency, acting in its public capacity.' " (Citing *McKay v. Utilities Comm.*, 104 Colo. 402, 91 P.2d 965, 973.)

Thus, the Court regretted that its decision imposed upon the petitioner payment of all of a tax which—had the petitioner known of the tax at an earlier time—could have been passed on to other parties. But the Court was nevertheless compelled to apply the generally accepted principle that a government acting in a public capacity cannot be estopped by the unauthorized acts of its agents.

Although the principle that persons who deal with agents of the government are assumed to have notice of the limitations upon the authority of such agents may well cause hardship in certain instances, it is a principle which is necessary to the continued efficient exercise of sovereignty. The powers of government could be severely impaired by

acts of public employees, if such acts could constitute a binding limitation upon the sovereign. Consequently, it is clear that the Commonwealth may lawfully seek to recover the amounts which should have been paid by the licensee under G. L. c. 147, § 40A.

I find no indication in the General Laws that such a claim would be barred by a statute of limitations. The three-year limitation for assessing certain excise taxes—such as that contained in G. L. c. 64C, § 7 (cigarette excise)—relates solely to the specific taxes referred to in the sections in which such limitation appears, and cannot arbitrarily be applied to the assessment called for by G. L. c. 147, § 40A. Nothing appears either in those sections relating specifically to the Boxing Commission, or in the sections governing tax collection in general, which would limit the right of the Commonwealth to enforce a claim of this nature.

Since the exercise of this power could cause undeserved hardship, the Legislature may choose to provide that the amounts in question not be recovered—an act which would clearly be constitutional in light of the fact that both the taxing statute in question and the erroneous interpretation of that statute were of general application. Short of such legislative relief, however, it is my opinion that the representations of former members of the Massachusetts State Boxing Commission cannot be used as a defense to claims by the Commonwealth for the payment of back taxes lawfully owed, and that the Commonwealth may proceed to collect the difference between the amounts paid and the amounts actually contemplated by the statute.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The current practice in both the state and federal courts in Massachusetts, whereby the name alone of the accused appears on an arrest warrant's face, even though the name may be borne by others as well, is proper and within the constitutional safeguards as they are now defined.

AUGUST 12, 1965.

HON. RICHARD R. Caples, *Commissioner of Public Safety*.

DEAR SIR:—In your letter of recent date, you have asked my opinion concerning the constitutionality of certain arrest warrant practices. The question common to the three parts of your request is whether the name of an accused alone meets the constitutional standard of particularity of description on an arrest warrant.

Although framed in terms of Article Fourteen of the Declaration of Rights, your question belongs, perhaps, more properly under the rubric of the Fourth and Fourteenth Amendments to the United States Constitution. As you know, Fourth Amendment rights have been incorporated into the due process clause of the Fourteenth in *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Mapp vs. Ohio*, 367 U.S. 643 (1961). Although those cases dealt specifically with search warrants, the Supreme Court has also drawn the arrest warrant requirements of the Fourth

Amendment within the ambit of the Fourteenth. See *Giordenello vs. United States*, 357 U.S. 480, 485-86 (1958). Thus, federal law must determine what constitutes a sufficiently particular description in an arrest warrant under the Fourth Amendment.

In the absence of cases precisely on point, *i.e.*, adjudicating the sufficiency of a warrant which, on its face, has the name only of the accused, a name borne by several persons in the community, Rule 4(b) (1) of the Federal Rules of Criminal Procedure, promulgated by the United States Supreme Court, indicates the standard of particularity required in a warrant. The Rule states in part: "The warrant . . . shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty." Thus, either the name of the accused *or* a sufficiently precise description, where the name is unknown, would appear to satisfy the Constitution.

Rule 4(b) (1) follows the historic test of a warrant's sufficiency. See *West v. Cabell*, 153 U.S. 78 (1894), *Duffy v. Keville*, 16 F.2d 828 (D.C. Mass. 1926), *Commonwealth v. Gedzium*, 259 Mass. 453, 156 N.E. 890 (1927), and *Commonwealth v. Crotty*, 92 Mass. (10 Allen) 403 (1865). Thus, under the present status of the law, either the name or, if that is unknown, the best possible description of the accused is enough to make the warrant constitutional. To say that more than the accused's true name must or should appear on the face of the warrant would attempt to forecast the Supreme Court's decision of a case never yet brought before it.

As it stands, therefore, my opinion is that the current practice in both the state and federal courts in Massachusetts, whereby the name alone of the accused appears on the warrant's face, even though that name may be borne by others as well, is proper and within the constitutional safeguards as they are now defined.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Commonwealth is without authority to bind the Federal Government or any of its agencies re expenditures of federal funds.

Despite doubts expressed as to a part being invalid, the Attorney General certified the petition and prepared a "fair concise summary thereof".

AUGUST 16, 1965.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR MR. WHITE:—The attached initiative petition entitled "AN ACT DETERMINING AND PRESCRIBING URBAN RENEWAL PROCEDURE, RIGHTS AND REMEDIES" was submitted to me, not later than the first Wednesday of August of the current year, by Mr. Shepard A. Spunt, of 147 Coolidge Street, Brookline, Massachusetts, in accordance with Articles 48 and 74 of the Amendments to the Constitution of the Commonwealth.

The function of the Attorney General with respect to initiative petitions is extremely limited. The Constitution of the Commonwealth provides that the Attorney General shall examine the measure and its title to determine whether the proposed act is in proper form for submission to the people; he must determine whether the proposed measure has been qualified for submission to the people at either of the two preceding biennial state elections; and he must decide whether the proposed measure contains matters which either are unrelated or not mutually dependent, or are excluded entirely from presentation to the people by means of the popular initiative. [Const. of the Comm., Amend. Art. 48, Init., Pt. 2, § 3, as amended by Amend. Art. 74]. Accordingly, certification of an initiative petition by the Attorney General does not depend upon the validity of the legislation proposed to be enacted, and the initiative petition is not examined by this Department for this purpose.

However, I believe that I should call to your attention—as well as to the attention of those who may eventually be in a position to vote upon or to amend the measure—that a part of § 2 of the proposed act may well be invalid if enacted in its present form. The provision in question appears in the final paragraph of § 2, and reads in part as follows: “No local, municipal state or *federal* governmental authority or their respective agents, servants, or employees or private individuals, agencies, corporations, foundations or other private or quasi-public entities shall spend any public funds whatsoever . . . in connection with the procedures above described.” [Emphasis supplied.] Although the Commonwealth of Massachusetts can naturally restrict the expenditures of both State and local governmental bodies, it is clear that the Commonwealth is without authority to bind the Federal government or any of its agents. Consequently, if the measure contained in this initiative petition is enacted, the provisions which relate to and attempt to regulate the functioning of Federal agencies will be of no effect.

As I have pointed out, however, questions relating to the validity of proposed legislation sought to be enacted by initiative petition cannot prevent certification of such a petition if all of the requirements of the State Constitution are otherwise met. Accordingly, I hereby certify with respect to the attached initiative petition (signed by ten voters certified to be qualified voters of the Commonwealth) that the measure in question and the title thereof are in proper form for submission to the people; that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial State elections; and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent.

In accordance with the constitutional provisions cited above, I have prepared “a fair concise summary” of the measure as follows:

SUMMARY.

The proposed act provides for the following of certain procedures in connection with urban renewal projects. Before a site may finally be

selected, and before actual planning may begin, there must first be held a public referendum to be participated in solely by property owners and tenants of the specific area under consideration for renewal. Each tenant or group of joint tenants shall have one vote, and each landowner or group of joint landowners shall have one vote for each property owned. If such qualified voters signify their desire for renewal by a two-thirds vote of those actually voting, or by a majority vote of those qualified to vote, the area in question shall be designated an urban renewal area. If such voters favor a renewal project, there shall be no change in the project boundaries unless a new referendum is conducted, with all tenants and landowners within the revised boundaries eligible to vote.

No urban renewal plan shall be submitted to or approved by the governing body of the locality involved, and no land or structures shall be taken, until after a second public referendum (participated in by property owners and tenants of the renewal area) in which the takings are approved by an eighty per cent vote of those actually voting, or by a vote of two-thirds plus one of those qualified to vote. Prior to this referendum, a copy of the renewal plan must be presented to each inhabitant, tenant and landlord of the area, and at least three public hearings must be held. The proposed plan must be mailed to all inhabitants of the renewal area at least thirty-five days prior to the referendum. The required public hearings must be held at least one week apart, with two of the hearings in the evening. Notice of each hearing shall be mailed to each inhabitant, landlord and tenant of the renewal area at least eight days prior to such hearing. The last hearing shall be held at least one week prior to the referendum, and the first shall not be held until three days after the mailing of the plans. At each public hearing, the renewal authority shall present its plans to the inhabitants. No public funds whatsoever shall be spent in connection with the above procedures except for the preparation and mailing of plans and statements of the renewal authority, the mailing of notices, the holding of public hearings and the conducting of the public referenda. The making of unauthorized expenditures shall cancel the result of any referendum, and those responsible shall be liable for the return of all expenses to the appropriating agency.

Rights formerly vested in renewal authorities to proceed to obtain control of property within the renewal area which must be acquired in order to carry out the renewal plan (short of actually obligating itself to acquire such property) prior to receipt of approval by the Division of Urban and Industrial Renewal are hereby repealed.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

In the event registry personnel use privately-owned scales to carry out their duties in enforcing G. L. c. 90, § 19A, the Commonwealth is immune from liability for any damage caused; the weighers and vehicle operators are liable for the negligence of the operator if the relationship necessary to create legal responsibility exists between them.

AUGUST 16, 1965.

HON. RICHARD E. McLAUGHLIN, *Registrar of Motor Vehicles.*

DEAR REGISTRAR McLAUGHLIN:—I have your letter of July 27, 1965, in which you refer to the use by Registry personnel of privately-owned scales to carry out their duties in enforcing G. L. c. 90, § 19A. You have requested my opinion on the following three questions:

“1. In the event the vehicle which is to be weighed causes damage to the scale, can the owner or operator of such vehicle be held liable for such damage?

2. Is there any liability upon the part of the Commonwealth for such damage?

3. Are weighing squad personnel liable for such damage by reason of having ordered the vehicle to be put on the scale?”

Directing my attention at the outset to your second question, it is my opinion that under no circumstances may the Commonwealth be held liable if one of the vehicles being weighed damages the scale. This is an example of the well-settled principle of sovereign immunity. As the Supreme Judicial Court pointed out in *McArthur Bros. v. Commonwealth*, 197 Mass. 137 (1908):

“It is fundamental that under our jurisprudence the sovereign power cannot be impleaded in its own courts except by its consent, and then only in the precise manner and to the exactly limited extent which may be pointed out in the terms in which the consent is expressed. Such consent can be granted only by the legislature, for our constitution contains no provision touching the subject.”

In other words, the Commonwealth can be sued in its own courts only when it has consented to be sued. Since the Legislature has not given this consent in the situation under discussion, the Commonwealth is immune from any liability. This conclusion is not affected by the fact that the Commonwealth pays no consideration for the use of the scales.

Turning now to your third question, the weighing personnel are liable for damage if—and only if—their negligence has contributed to that damage. The fact that a weigher may have ordered a given vehicle to be placed on the scale is of no particular relevance. The weighing squad personnel consist of registry inspectors appointed as weighers under G. L. c. 41, §§ 87A and 87B. You have informed me that the privilege of using the scales is in the nature of a license; thus, the relationship of the weigher to the owner of the scales is that of a gratuitous licensee. In other words, the weigher is allowed to perform a series of acts upon the land and scales of the owner. It is well settled that if no special

relationship exists between the parties, the duty owed is that of reasonable care—i.e., the weigher must not act in a negligent manner. Thus, the weighers would be liable only if the damage were caused by their negligent conduct.

Moreover, the fact that the weighers are employees of the Commonwealth does not shield them from liability for their negligent acts. *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 33 (1890). In the *Murdock* case the Supreme Judicial Court, having dismissed a tort claim against the State on the grounds of sovereign immunity, advised the plaintiff that he was not without remedy: "Where wrongs are done to individuals by those who are servants of the government, those injured are not remediless, as such persons may be sued as may be other citizens for the torts which they commit." *Id.* at 33. Accordingly, it is clear that weighing squad personnel will be liable for damages to the scales caused by their own negligence.

In answer to your first question, it is my opinion that the operator of the vehicle which is being weighed is likewise liable for damages caused by his negligence. This is merely an application of common law principles of tort liability. In addition, the registered owner of the vehicle may be held liable for the negligence of the operator if there exists between owner and operator a relationship upon which the law predicates legal responsibility—for example, the use of a vehicle with the permission of the registered owner, or some other form of the principal-agent relationship.

In summary, while the Commonwealth is immune from liability for any damage done to the scales, the weighers and the vehicle operators are liable for negligent acts of damage, and the vehicle owner may be liable for the negligence of the operator if the relationship necessary to create legal responsibility exists between them.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

G. L. c. 125, § 9 limits mandatory re-training to officers of the Department of Correction who at the time of actual enrollment have not reached their fiftieth birthday, and such limitation is applicable not only to present but also to future employees of the department.

AUGUST 17, 1965.

HON. JOHN A. GAVIN, *Commissioner of Correction*.

DEAR COMMISSIONER GAVIN:—I am in receipt of your letter of June 15, 1965, which requested an opinion on that part of G. L. c. 125, § 9 which provides for refresher courses for department personnel.

Specifically, you have asked:

"... whether or not I am restricted in assigning correction officers to the school for such training who have reached their 50th birthday, and whether or not the restriction of assigning correction officers and employees to the training school for additional courses of training applied only to the existing permanent correction officers and employees who had

reached their 50th birthday at the time that the training school was first established."

My answers, in summary, to your two questions are:

(1) You are restricted by law in the assignment of employees 50 years of age or older to refresher courses and may not compel attendance by such persons.

(2) The 50-year limit refers not just to the age of existing officers at the time the school was established, but to their age at the time they are actually called for the refresher course.

The pertinent statute is G. L. c. 125, § 9, par. 4, which reads:

"Additional courses of training shall be instituted for existing permanent correction officers, employees of said department who have not reached their fiftieth birthday."

I am guided in my construction of the statute by its evident purpose, namely, to insure the highest possible training and competence for officers of the department. To achieve this goal, G. L. c. 125, § 9, par. 1 provided for the establishment of a training school and required all prospective officers as part of their probationary period to undergo a course of training "not to exceed eight weeks. . . ."

Paragraph 1, however, did not deal with the existing, permanent officers who, by virtue of their position, were not required to take the newly prescribed probationary training. Paragraph 4 undertook to further the knowledge of the existing, permanent officers through the institution of refresher courses. The statute thus recognized two broad categories of department officers: new recruits and existing, permanent employees.

But within the general classification of "existing permanent correction officers," the Legislature has made another division, this along the line of age 50. The legislative purpose appears to have been to establish age 49 as the outer age limit, beyond which officers could not be compelled to take refresher courses. There is no statutory provision for the immediate implementation of refresher courses at all, and only a reading of the age-50 limit as a continuing and permanent one will save the paragraph from being rendered nugatory. Likewise, if age 50 referred either to the moment the legislation was enacted or the date when the school was established, delay in calling the officers to the courses could well result in compulsory enrollment of officers well over 50 years of age. The statute limits mandatory re-training to officers who at the time of actual enrollment "have not reached their fiftieth birthday," and such limitation is applicable not only to present but also to future employees of the department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A provision in a proposed act which denies to certain persons the rights which are enjoyed by others in the same category contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and is accordingly an invalid and ineffective exercise of legislative authority.

If an unconstitutional portion of an act may be removed without doing violence to the statute as a whole, the constitutional sections may be allowed to remain in full force and effect.

AUGUST 17, 1965.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth.*

DEAR GOVERNOR VOLPE:—On August 13, 1965, you submitted to me a photostat of Senate Bill number 1117, passed to be enacted by the General Court earlier this month. The bill, which contains an emergency preamble, is entitled "AN ACT PROVIDING FOR THE ELIMINATION OF RACIAL IMBALANCE IN THE PUBLIC SCHOOLS," and presently awaits action by you as Governor of the Commonwealth.

You have requested my opinion with regard to the constitutionality of the proposed measure. In addition, should a given provision prove to be unconstitutional, you have asked whether such invalidity will affect the entire measure, so as to leave the Commonwealth with no valid racial imbalance legislation whatsoever.

In brief, the Act declares it "to be the policy of the Commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools." The first section requires each school committee in the Commonwealth to submit annually to the State Board of Education statistics with regard to the percentage of non-white pupils in public schools. The State Board of Education shall examine the statistics, and shall determine therefrom whether racial imbalance exists in the schools in question. Under this Act, the term "racial imbalance" is intended to refer to a ratio between non-white students and other students in a given public school system "which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work." In addition, racial imbalance shall be deemed to exist in all cases in which the percentage of non-white students in any public school exceeds fifty per cent of the total number of students.

If the State Board of Education determines that racial imbalance exists in a given public school system, it shall notify the appropriate school committee in writing of its finding. The said school committee must thereupon prepare a plan for the purpose of eliminating the imbalance, and file a copy of the plan with the State Board. Such a plan may include—among other things—changes in existing school attendance districts, locations of proposed new school sites, proposed additions to existing school buildings, and "projections of the expected racial composition of all public schools." Municipalities may cooperate in making facilities available; however, no student may be transported to any school outside of the school district established for his neighborhood if the parent or guardian of such student files written objection to such transportation with the school committee. Upon petition by the State

Board of Education, the Supreme Judicial or the Superior Court may enforce the provisions of this section.

The second section of the Act sets forth certain sanctions which may be imposed in case a given school committee refuses to cooperate in the elimination of racial imbalance. Should a school committee fail to file a plan as described above, the State Board shall itself make specific recommendations for the purpose of eliminating racial imbalance in the community or regional district in question. If—after being notified that racial imbalance exists—a school committee “does not show progress within a reasonable time” in eliminating such imbalance, the Commissioner of Education shall not certify the amount of State Aid to which the community or district would otherwise have been entitled, nor shall the School Building Assistance Commission approve any project for school construction. The Commissioner may notify the Commissioner of Corporations and Taxation and the Comptroller of the Commonwealth to withhold State Aid funds which have been certified but not yet distributed. Upon receipt of a satisfactory plan, the Commissioner of Education may order such funds to be paid, and the School Building Assistance Commission may approve the above-mentioned projects. If the State Board determines that construction or enlargement of school buildings is for the purpose of reducing or eliminating racial imbalance, the amount of the state grant for such construction may be increased to sixty-five per cent of the approved cost.

If a school committee refuses to accept recommendations made by the State Board, or if the said Board disapproves a revised plan submitted to it, the school committee may—within thirty days after such refusal or disapproval—seek judicial review of the Board’s decision in the Superior Court for the county in which it operates or in the Supreme Judicial Court for Suffolk County. The Court may affirm the Board’s decision and enter a decree ordering compliance with its recommendations; but if the Court rules that the Board’s decision is arbitrary or otherwise not in accordance with law, it shall set aside such decision and remand the matter to the Board for further action. Either the Supreme Judicial or the Superior Court may—upon petition by the State Board—order funds withheld as described above for whatever period of time the Court determines.

There can be no question that the provisions set forth above are valid enactments of the Legislature completely in accord with both the Federal and the State Constitutions. It is the final paragraph of the Act which provides for an Advisory Committee on Racial Imbalance which is the part of the measure which is of particular concern. The paragraph provides as follows:

“The board of education, with the advice of the commissioner, shall appoint an advisory committee on racial imbalance *and no individual shall be appointed to this advisory committee on racial imbalance who has been listed in any state or federal document as being a member of a communist front organization.* The members of the committee shall serve without compensation except that they may be reimbursed for the necessary expenses actually incurred in the performance of their duties. [Emphasis supplied.]

Your questions relate most directly to the underlined portion of the paragraph.

It was obviously the purpose of the General Court to prohibit the appointment of Communist Party members and sympathizers to the newly created Advisory Committee on Racial Imbalance. The rationale which underlies such a legislative determination need not be analyzed in order to decide whether the provision in question is constitutional. The United States Supreme Court has ruled that the Communist Party may be subjected to special legislative provisions not imposed upon other political parties without violating the Federal Constitution. *Dennis v. United States* 341 U.S. 494. *Scales v. United States* 367 U.S. 203. It is not the decision to bar Communists from Advisory Committee participation, but the means by which this decision is to be implemented, which must be examined.

The provision prohibits the appointment of any person "who has been listed in any state or federal document as being a member of a communist front organization." It is clear that the clause is far reaching in scope. Even our smallest State agency accumulates a sizeable number of papers in the course of a year. The measure indiscriminately refers to every document of every agency, commission or department of government of each of the fifty states and of the Federal government without specific regard to their nature. Since the provision contains no indication that it is limited to documents of present date, presumably documents of all dates must be included. Some of these documents must inevitably be confidential in nature. It is apparent that the Board of Education could never fully comply with the herculean task set for it by the Legislature.

The magnitude of the disability provision is one indication of its lack of accuracy in identifying persons who actually are or might have been Communist Party members or sympathizers. Since so many documents are included, the material contained therein will naturally be of varying degrees of reliability. Certain State or Federal governmental papers may well accurately name individuals who are in fact Communists. But it is also true that other papers will undoubtedly be inaccurate, and may well identify as members of Communist front organizations men and women who have had no contact with such groups and who are completely independent of Communist philosophy and operations.

The fact that a person has been listed in a governmental document as a member of a Communist front organization is, in my opinion, far from an effective guide to a determination whether such a person is in fact a Communist or a Communist sympathizer. It is clear that if such a standard is used both Communists and non-Communists could be barred from the Advisory Committee. Thus the Legislature will have created an arbitrary distinction between non-Communists who happen to have been mentioned in a governmental document as members of Communist front organizations and non-Communists who have not been so mentioned. As such, the provision represents an unreasonable legislative classification which denies to certain persons the rights which are enjoyed by others in the same category.

It is my considered opinion, therefore, that the provision in question contravenes the "equal protection" clause of the Fourteenth Amendment

to the Constitution of the United States, and is accordingly an invalid and ineffective exercise of legislative authority.

Although it is my opinion that this portion of the Act is unconstitutional, this does not mean that the measure as a whole must be declared invalid. I am aware that the measure in its present form does not contain a "severability clause." But lack of such a clause is not necessarily determinative. It is an accepted principle that a statute may be unconstitutional in one part, yet constitutional in another. If the unconstitutional portion may be removed without doing violence to the statute as a whole, the constitutional sections may be allowed to remain in full force and effect. *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Mutual Loan Co. v. Martell*, 200 Mass. 482, 487.

The fact that a severability clause has not been included will not prevent the retention of valid provisions in cases in which unconstitutional portions may actually be separated.

The Act does not stand or fall upon the inclusion of an Advisory Committee. As described above, the Act sets up procedures for the elimination of racial imbalance in the public schools, and imposes certain sanctions upon school committees who choose not to carry out the legislative mandate. The objectives of the Act are to be attained by means of participation by local school committees and by the State Board of Education.

The Advisory Committee on Racial Imbalance was included in the measure by Section 1K, being the last paragraph of the Act. Its duties are not defined, and there is no indication as to the number of persons to be appointed. It has apparently been created solely for the purpose of making recommendations to the governmental bodies responsible for the execution of the Act's provisions. It is clear that the Legislature's intention to develop procedures by which racial imbalance could be reduced and eliminated could be effectuated without reference to an Advisory Committee. Likewise, the Advisory Committee members may be appointed and may proceed to perform their functions despite the fact that a provision governing who is to be appointed has proven to be invalid.

Accordingly, it is my opinion that the unconstitutional portion of the last paragraph of the Act may be severed from the remainder, and that—despite the invalidity of this provision—the measure as a whole will, upon your approval, be fully effective.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The responsibility for defining and applying the term "good-moral character" is vested in the Board of Registration, with such determination to be made on the basis of specific factual situations.

AUGUST 18, 1965.

MISS WINIFRED V. SHUMAN, R.N., *Executive Secretary, Board of Registration in Nursing.*

DEAR MISS SHUMAN:—I am in receipt of your letter of August 3, 1965, requesting my opinion regarding the eligibility of ex-convicts for registration as professional nurses or for licensing as practical nurses.

Specifically, you have asked for my opinion as to the meaning of the requirement of "good moral character" contained in G. L. c. 112, §§ 74 and 74A, especially in its application to the rehabilitated ex-convict.

General Laws c. 112, §§ 74 and 74A provide in part:

"... An applicant who furnishes satisfactory proof that he is of good moral character and a graduate of a school for nurses approved by the board shall ... be examined by the board, and, if found qualified, shall be registered. ..."

"... An applicant who furnishes satisfactory proof that he is of good moral character and a graduate of a school for practical nurses approved by the board shall ... be examined by the board and, if found qualified, shall be licensed. ..."

The meaning of the phrase "good moral character" contained in the above-quoted sections has not been specifically defined by the Legislature. This is understandable, considering the possible scope of a concept such as "good moral character." Clearly, had the Legislature desired to define the scope and content of "good moral character" for the purpose of the registration or licensing of nurses, it would have done so by the use of express language. Since the Legislature has not indicated the exact meaning of "good moral character," it is my opinion that the responsibility for defining and applying this standard is vested in the Board itself.

This is confirmed by two factors: first, the necessity of flexibility in construing the meaning of "good moral character;" secondly, the fact that approval or disapproval of candidates for the nursing profession can best be accomplished by a professionally experienced board on a case-by-case basis. Accordingly, application of the standard of "good moral character" will depend upon the specific factual situations which are presented to the Board.

Therefore, in the case of rehabilitated ex-convicts, it will be the responsibility of the Board to determine whether such rehabilitation has been sufficiently successful to warrant a conclusion that the applicant now complies with the "good moral character" standard. As indicated above, such a determination can be made solely upon a specific factual basis, and cannot be made in the abstract.

The only possible guideline that I can furnish is that already in c. 112, §§ 74 and 74A. The relevant sections provide:

“ . . . The board . . . may annul the registration and cancel the certificate of any nurse who has been found guilty of a felony.”

“ . . . The board . . . may annul the license and cancel the certificate of any practical nurse who has been found guilty of a felony.”

It is my opinion that the above-quoted sections—which sections give the Board authority to annul the license or registration and cancel the certificate of any nurse convicted of a felony—at least by implication indicate that the Board has authority initially to refuse to register or license a convicted felon on the grounds of bad moral character. A felony conviction may well not be conclusive of the matter; it is, however, one factor which the Board should consider. Consequently, it is for the Board to decide how much weight is to be given to the fact of a conviction, and how successful has been the rehabilitation process.

In conclusion then, it is my opinion that the determination of the scope and content of the requirement of “good moral character” rests with the Board, with such determination to be made on the basis of specific factual situations. In the case of a convicted felon, the Board may clearly find the absence of “good moral character.” However, the effects of rehabilitation upon an ex-convict may be such as to warrant a conclusion that the applicant is once again a person of “good moral character,” and the Board may, based upon such a conclusion, register or license the applicant in question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The Alcoholic Beverage Control Commission is specifically authorized to make regulations governing the submission by applicants of sworn statements and documents concerning the direct or indirect ownership of and direct and indirect holding of beneficial interests in an applicant's business.

The Commission has the authority and duty to investigate the corporate or business ownership of the applicant for the original issuance, renewal or transfer of a license under §§ 12 or 15 of G. L. c. 138, and of all those holding a direct or indirect beneficial interest in said license, corporation or business.

AUGUST 19, 1965.

HON. QUINTIN J. CRISTY, *Chairman, Alcoholic Beverage Control Commission.*

DEAR MR. CRISTY:—This is in reply to your request for an opinion, dated August 11, 1965, concerning the authority and duty of the Commission to adopt reasonable regulations governing the submission of sworn statements on direct or indirect ownership of and the direct or indirect holding of beneficial interests in an applicant's business.

The Commission, created by G. L. c. 6, § 43, is charged, in § 44, with the specific responsibility “of general supervision of the conduct of the

business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages. . . ." The legislative history of G. L. c. 6, §§ 43 and 44, and G. L. c. 138, the Liquor Control Act, clearly establishes that the Commission's powers to supervise licensees were not intended to be limited in scope. *Connolly v. Alcoholic Beverage Commission*, 334 Mass. 613, 617.

General Laws, c. 138, § 15, deals with the issuance of licenses for the sale of alcoholic beverages not to be drunk on the premises, and specifically provides that "no such license shall be granted except to an applicant approved by the Commission."

Such a requirement necessarily presupposes that the Commission will investigate the qualifications of an applicant before approving his request for a license. Similar provisions apply to licenses for beverages to be drunk on the premises under G. L. c. 138, § 12.

The Liquor Control Act specifically provides that the holder of a license under Section 12, a license for on-premises consumption, cannot also hold, directly or indirectly, a license under Section 15, a license for the sale of alcoholic beverages not to be consumed on the premises. In addition, Section 15 provides, in part:

"No person, firm, corporation, association, or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer, or other person or any subsidiary whatsoever, shall be granted, in the aggregate, more than three such licenses in the commonwealth, or be granted more than one such license in a town or two in a city."

One important qualification which therefore must be investigated by the Commission is the direct or indirect ownership of and the direct or indirect holding of beneficial interests in the applicant's business.

It is evident from past judicial decisions that the Alcoholic Beverage Control Commission has used its authority to investigate the existing patronage of a liquor license applicant, the proximity of churches and schools, and the broad public interest in awarding the applicant a license. *Connolly v. Alcoholic Beverage Control Commission*, supra. It is also evident that the exercise of discretion by the local authorities in a city or a town is subject to review by the Alcoholic Beverage Control Commission. *Webster v. Alcoholic Beverage Control Commission*, 295 Mass. 572.

General Laws, c. 138, § 24 specifically authorizes the Commission to make regulations for clarifying, carrying out, enforcing and preventing violation of the Liquor Control Act. This would include the adoption of reasonable regulations governing the submission by the applicant of sworn statements and documents concerning the direct or indirect ownership of and direct or indirect holding of beneficial interests in an applicant's business.

Under G. L. c. 138, § 23, the applicant for the issuance, renewal or transfer of a license must submit a sworn statement giving names and addresses of all persons who have direct or indirect beneficial interests in said license. The section provides in part "no license shall be issued, renewed or transferred under sections twelve, fourteen, fifteen or thirty A unless there is filed with the application for such license a sworn

statement by the applicant, or in case of a corporation by a duly authorized officer thereof, giving the names and addresses of all persons who have a direct or indirect beneficial interest in said license." Clearly, the Commission has the authority to require a copy of the statement filed with each license application. The information furnished in such a sworn statement is a logical starting point for investigation by the Commission of license ownership.

Aside from the statutory requirements it is logical that a State agency should investigate the ownership of an applicant who may hold licenses throughout the Commonwealth. Local boards do not have at their disposal information enabling them to determine whether or not the actual owner-applicant has three or more package stores in different parts of the Commonwealth or is the holder of a license under § 12. Only the Commission has this inherent ability.

Based on the foregoing, it is my opinion that the Commission has the authority and duty to investigate the corporate or business ownership of the applicant for the original issuance, renewal or transfer of a license under §§ 12 or 15 of G. L. c. 138, and of all those holding a direct or indirect beneficial interest in said license, corporation or business. As a necessary part of this obligation, the Commission is authorized to adopt reasonable regulations which may require an applicant to submit statements to the Commission concerning the direct or indirect ownership of and the direct or indirect holding of beneficial interests in the applicant's business or corporation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Secretary of the Commonwealth upon receiving notice of dishonor of a check given in payment of the filing fee anent articles of organization and annual certificate of condition, is not empowered to consider the papers as never having been filed and to remove them from the public records.

AUGUST 19, 1965.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR SIR:—I have received a letter from Mr. Theodore V. Anzalone, Director of the Corporation Division of the Office of the Secretary, with regard to the procedure to be followed by that division upon the return "unpaid" of a check given in payment of the statutory fees for filing articles of organization and annual certificates of condition. Mr. Anzalone stated that checks are frequently accepted in payment of these fees and that the practice of the division is to record and file the accompanying documents before the check is paid. He has asked whether your office is empowered, in cases in which checks are returned unpaid, to consider the papers as never having been filed and to remove them from the public records.

Section 11 of Chapter 156 of the General Laws states in part:

"... If he [the Secretary of the Commonwealth] finds that the

provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles. Thereupon, *the articles shall, upon payment of the fee provided . . . be filed* in the office of the state secretary." [Emphasis supplied] (See also G. L. c. 156B, § 6 and 12, effective October 1, 1965.)

And Section 48 of the same chapter provides:

"The secretary shall examine such (annual report of condition) . . . ; *and upon the payment of the fee required . . . it shall be filed* in the office of the state secretary . . ." [Emphasis supplied] (See also G. L. c. 156B, § 110, effective October 1, 1965.)

It is clear from the language of both section 11 and section 48 that actual payment of the proper fee is an express condition precedent to the filing of either articles of incorporation or annual reports. The Secretary could properly require that all fees for filing these documents be paid either by cash or by certified check. He is under no obligation to rely on the credit of the drawer of an uncertified check. If, however, he is willing to accept an uncertified check as conditional payment of these fees, there is no provision of law which would prohibit him from withholding or delaying recording of the documents until such check is in fact paid.

In answer to the specific question whether the Secretary may withdraw a recorded document upon receiving notice of dishonor of a check given in payment of the filing fee, however, it is my opinion that such a practice would not be justified.

If a check which has been accepted in payment of filing fees is not honored, the Secretary has remedies other than removal of the documents from the files. He may attempt to collect the amount owed by means of civil proceedings. He may, in the alternative, make a criminal complaint under G. L. c. 266, § 37. He may not, however, lawfully remove a public record once it has been accepted and filed.

Articles of incorporation and annual statements of condition have been made public records for the benefit of suppliers, lenders, and other businessmen who may wish to obtain information about a corporation with which they are dealing or are about to deal. The possibility that a document might be withdrawn from these files would seriously reduce their value as a source of reliable information. The right of third parties to depend on public records makes it imperative that public filing be regarded as permanent and not subject to later revocation. Chapter 66 of the General Laws sets out the procedures for the care and maintenance of public records, and there exists in that chapter no authorization for the removal of a document once it has been accepted as a public record.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Members of the Youth Service Board are not subject to the state employee travel expense rules and regulations. Board members are entitled to reimbursement by the Commonwealth for all actual and necessary travel expenses incurred in the performance of their official duties.

AUGUST 23, 1965.

HON. JOHN D. COUGHLIN, *Director, Division of Youth Service.*

DEAR MR. COUGHLIN:—This is in reply to your letter of June 29, 1965, in which you requested an opinion concerning the payment of travel and other expenses incurred by members of the Youth Service Board in the performance of their duties. You ask specifically whether Board members are subject to the general travel expenses rules and regulations for state employees.

Members of boards who are appointed by the Governor are specifically exempted by c. 7, § 28 and the rules and regulations governing travel, vacation leave, etc. made thereunder from the travel expense rules for state personnel.

The general rule on travel expenses of officers is found in c. 30, § 25, which states in part:

“... officers ... whose duties require them to travel elsewhere than to and from the offices provided for them by the commonwealth ... *shall be allowed their actual and reasonable expenses incurred in the performance of such duties, if such expenses are authorized by law to be paid by the commonwealth.* Bills for such expenses shall be itemized and the dates when, and the purposes for which, such expenses were incurred shall be stated before their allowance by the comptroller.” [Emphasis supplied.]

Chapter 6, § 66 states in part:

“... each member (of the Youth Service Board) shall also be reimbursed for his expenses actually and necessarily incurred by him in the performance of his official duties. ...”

Section 66, in my opinion, authorizes reimbursement to members of the Youth Service Board of travel expenses incurred in the performance of their official duties.

Section 67 spells out the official duties and functions of the Youth Service Board, which include cooperation with local agencies and visits to the county training schools. Travel is obviously essential to the complete discharge of the members' official responsibilities. It is clearly the intent of the Legislature, from the language of § 66, that legitimate travel expenses be included among those expenses which will be “actually and necessarily incurred ... in the performance of ... official duties.” Consequently, legal authority for reimbursement of travel expenses exists, and Youth Service Board members may recover reasonable amounts under c. 30, § 25.

Accordingly, it is my opinion that members of the Youth Service Board are not subject to the state employee travel expense rules and

regulations. Board members, in my opinion, are entitled to reimbursement by the Commonwealth for all actual and necessary travel expenses incurred in the performance of their official duties.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Disclosure of records of the Commission of Rehabilitation to any agency not "directly concerned in the vocational rehabilitation" of applicants, as that clause is used in c. 6, § 84, M.G.L., would constitute a violation of that statute.

AUGUST 24, 1965.

HON. FRANCIS A. HARDING, *Commissioner of Rehabilitation*.

DEAR COMMISSIONER HARDING:—I have received your letter of March 31, 1965 in which you inquire whether your proposed plan to enlist the assistance of the Shawmut Neighborhood Center in locating applicants with whom the Commission has lost contact would contravene the provisions of G. L. c. 6, § 84. Specifically, you have asked my opinion on the following question:

“ . . . whether divulging the information that a certain person is a client of the Commission or an applicant to a private organization like the Shawmut Neighborhood Center would conflict with Section 84 of Chapter 6, which set forth the provisions for confidentiality of files of clients in the Commission.”

It is my opinion that this question must be answered in the affirmative. G. L. c. 6, § 84 provides in part:

“Information or records concerning any applicant for vocational rehabilitation shall be confidential and for the exclusive use and information of the commission in the discharge of its duties. Such information or records shall not be open to the public . . . and shall not be admissible in any action or proceeding unless the commission is party to such action or proceeding; provided, however . . . that the commission may . . . provide such information to any person or department, division or sub-division of the commonwealth *directly concerned* in the vocational rehabilitation of said applicant. . . .” [Emphasis supplied.]

Clearly, it was the intention of the General Court generally to preserve the confidentiality of the information and records pertaining to applicants for vocational rehabilitation. The specific exceptions which are set forth in the statute represent a departure from the primary purpose of the law, and must accordingly be construed strictly.

The standard set forth by the General Court to determine exactly to whom the pertinent information may be divulged is clear: namely, those “directly concerned” in the rehabilitation process. Persons included within this category could—for example—be psychiatrists and other

specialists called in as expert consultants to assist in the rehabilitation of a particular applicant. The interest of a prospective employer would also seem sufficiently direct so as to include him within the group to whom information and records may be divulged. On the other hand, the work you wish to have performed by the Shawmut Neighborhood Center is primarily that of a detective service. Such gathering of information is not, in my opinion, directly involved in rehabilitation to a sufficient extent to outweigh the general legislative policy in favor of individual privacy and against indiscriminate disclosure of rehabilitation records.

Application to the Commission is purely voluntary. No one may be placed involuntarily in the custody of the Commission, nor may anyone be compelled to accept assistance. Once an individual has applied, the Commission is without authority to prevent his subsequent withdrawal. It is clear that confidential Commission records should not be disclosed in an effort to force rehabilitation upon persons who may well have lost interest in receiving such services.

Accordingly, in light of the above, it is my opinion that the Shawmut Neighborhood Center is not "directly concerned in the vocational rehabilitation" of applicants as that clause is used in c. 6, § 84, and that disclosure of Commission records to the Center would constitute a violation of that statute.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The provisions of c. 29, § 30, M.G.L., preclude the Massachusetts Executive Committee for Educational Television from insuring its furniture and equipment.

AUGUST 24, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—I am in receipt of your letter of August 3, 1965, in which you request my opinion regarding the applicability of G. L. c. 29, § 30 to the Massachusetts Executive Committee for Educational Television. [G. L. c. 71, § 13F.] Specifically, you have asked "whether, despite the language of Chapter 29, § 30 of the General Laws, it [the Executive Committee] can insure its furniture and equipment since the program is conducted as a trust fund operation without appropriations."

General Laws c. 29, § 30 provides as follows:

"No officer or board shall insure any property of the commonwealth without special authority of law."

The above-quoted section indicates that the answer to your question must be in the negative. The General Court has clearly determined that the Commonwealth is to be a self-insurer of its property. The authority to insure the Commonwealth's property must be specifically granted by

the Legislature. Authorization of this nature does not appear in the statutes which govern the Executive Committee.

The application of this section cannot be limited to those officers or boards whose expenses in acquiring insurance would be payable by appropriation. Such a limitation does not specifically appear in the statute, and it cannot be implied. Chapter 29, § 30 can only be limited by the enactment of a specific provision authorizing a given officer or board to purchase insurance; absent such special authorization, the expenditure of funds for insurance by officials of the Commonwealth is precluded.

Accordingly, it is my opinion that the provisions of c. 29, § 30 preclude the Massachusetts Executive Committee for Educational Television from insuring its furniture and equipment.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

G. L. c. 90, § 49(c) (4) was intended to operate only where the federal government has exerted its control over aircraft through the process of certification.

The Provincetown-Boston Airline, Inc., is not a "federally certified" airline as that term is employed in § 49(c) (4), and is required, by the provisions of G. L. c. 90, § 49, to register with the Massachusetts Aeronautics Commission and pay the fee prescribed.

AUGUST 26, 1965.

HON. CROCKER SNOW, *Director of Aeronautics, Massachusetts Aeronautics Commission*.

DEAR DIRECTOR SNOW:—I am in receipt of your letter of August 11, 1965, in which you request my opinion upon the application of G. L. c. 90, § 49, as amended by c. 590 of the Acts of 1964. Specifically, you have asked "whether or not Provincetown-Boston Airlines, Inc., is required, by the provisions of c. 90, § 49 to register with us and pay the fee prescribed?"

G. L. c. 90, § 49, as amended by c. 590 of the Acts of 1964, provides in part as follows:

"(b) Subject to the limitations of said paragraphs (c) and (e), every person who operates an aircraft shall register the federal aircraft certificate of said aircraft with the commission during each period in which the aircraft is operated within the commonwealth. The commission may charge for each such registration, and for each renewal thereof, fees as follows:

(c) Possession of the appropriate effective federal certificate, permit, rating or license relating to competency of the pilot or ownership and airworthiness of the aircraft, as the case may be, and the payment of the

appropriate fee as set forth in this section, shall be the only requisites for registration of a pilot or an aircraft.

“

(e) The provisions of this section shall not apply to:

1. an aircraft owned by, and used exclusively in the service of, any government, including the government of the United States or of any state thereof, or political subdivision thereof, which is not engaged in carrying persons or property for commercial purposes;

2. an aircraft registered under the laws of a foreign country;

3. an aircraft owned by a non-resident and based in another state;

4. an aircraft engaged principally in federal certificated scheduled airline operation;

“”

The language of c. 90 § 49 which provides for the registration of federal certificates does not distinguish between the different types of federal certificates which may be awarded to aircraft. That section simply provides for registration of “the federal certificates” in such manner as is prescribed by the Commission. In light of this lack of distinction, it is my opinion that—absent an exemption—the registration and fee provisions of G. L. c. 90, § 49 are intended to apply to each and every federal certificate awarded to an aircraft.

In your letter you indicate that the Provincetown-Boston Airline, Inc. does not possess a federal certificate of public convenience and necessity, relief from that requirement having been granted by the Civil Aeronautics Board. The airline does, however, possess a federal safety operating certificate. The safety operating certificate is a federal certificate within the purview of § 49. Accordingly, it must be registered with the Aeronautics Commission, and the registration fee paid, unless otherwise exempted from that requirement.

The chief question that you raise is whether the Provincetown-Boston Airline, Inc. is entitled to an exemption from registration and fee requirements of § 49 (a) through (d) by virtue of the application of § 49 (e) (4). The answer to this question rests upon a determination whether the aircraft of the Provincetown-Boston Airline, Inc. come within the language of § 49 (e) (4) as being “engaged principally in federally certificated scheduled airline operation.”

It is apparent from a reading of the first three exemptions of § 49 (e) that the aircraft therein qualified for exemption are those already controlled and regulated by a responsible agency: the federal government (§ 49 (e) (1)); a foreign country (§ 49 (e) (2)); or another state (§ 49 (e) (3)). Each of these three exemptions is predicated upon the existence of another source of control, thus obviating the necessity of any regulation by the Massachusetts Aeronautics Commission. The intention of the Legislature in providing such exemptions from the registration requirement of § 49 was clearly to eliminate an unnecessary burden on the airlines by avoiding duplication of what had otherwise

been accomplished—i.e., the control and regulation of aircraft by a responsible agency. In the case of the federal government regulation is provided by Public Law 85-726.

Public Law 85-726, 75 Stat. 754, Title IV—Air Carrier Economic Regulation provides in part:

“Sec. 401(a) certificate required—air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.”

“Sec. 401(d) (1) Issuance of Certificate—The Board shall issue a certificate. . . if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this act and the rules, regulations, and requirements of the Board hereunder,”

“Sec. 416 (b) (1)—The Board from time to time and to the extent necessary, may. . . exempt from the requirements of this title or any portion thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier. . . if it finds that the enforcement of this title. . . would be an undue burden on such air carrier and is not in the public interest.”

The exemption of sec. 416 (b) (1), as applied to the Provincetown-Boston Airline, Inc., relieves that airline of the necessity of compliance with the provisions of sec. 401(a) of the Act. As a result, the requirement of sec. 401(a) (1), that the Board make findings prior to the issuance of the certificate of public convenience and necessity, is eliminated. An aircraft exempted from the provisions of Public Law 85-726 Title IV is therefore not only exempted from the license requirement of the Act, but also from the necessity of compliance with the numerous other provisions contained therein—e.g., the filing of tariffs, sec. 403; the duty to provide service, rates, and divisions, sec. 404; the filing of reports, sec. 407; stock ownership, sec. 407 (b); prescribed accounts, reports and memoranda, sec. 407(d); inspection of accounts and property, sec. 407(e); consolidation, mergers, and acquisition of control, sec. 408; loans and financial aid, sec. 410; methods of competition, sec. 411.

It is the existence of such control and regulation which obviates the necessity of the registration procedure of c. 90, § 49. In view of the exemption of the Provincetown-Boston Airline, Inc. from the requirement of having a certificate of public convenience and necessity, the existence of control and regulation by a responsible agency, upon which the exemption of § 49 (e) (4) is based, is lacking. Consequently, the registration requirements of the Commonwealth would become applicable in order to insure that the airline in question does not remain entirely unregulated.

It is my opinion that the meaning of the language of § 49 (e) (4), in the context of the other exemptions and the purposes of the statute, is restricted to those aircraft certificated by the federal government in such manner as to be substantially under the control and regulation of the Civil Aeronautics Board. The possession of a safety operating certificate, although indicative of the exercise of some degree of federal control and regulation, would not be sufficient to warrant the exemption of aircraft so

controlled and regulated from the requirements of state registration. The extent of control and regulation implicit in the requirements of "federally certificated," as set out in § 49(e) (4), is more extensive than that provided by a safety operating certificate. It must be regulation that would eliminate the necessity of additional state control. In this instance, it is clear that this would be accomplished by the certificate of public convenience and necessity, but not by the safety operating certificate alone.

It is my opinion, therefore, that § 49(e) (4) was intended to operate only where the federal government had exerted its control over the said aircraft through the process of certification. The Legislature provided this exemption in reliance upon the establishment of appropriate controls by the federal government as exemplified in the sundry requirements to be satisfied antecedent to issuance of a certificate of public convenience and necessity. However, in the present case, such federal control is not exerted. The Provincetown-Boston Airline, Inc., despite possession of a safety operating certificate, is not a "federally certificated" airline as that term is employed in § 49(4) (4), and accordingly cannot be exempted on that basis from the provisions of § 49.

The only remaining question to be answered is whether the grant of a specific exemption from the requirement of obtaining a certificate of public convenience and necessity would—in and of itself—suffice to qualify the airline as being "federally certificated."

In my opinion, the answer is in the negative. Although Public Law 85-726, 75 Stat. 754, Title IV, relieves certain aircraft governed by its provisions of the necessity of obtaining a certificate of public convenience and necessity, there is no reasonable basis for asserting that the effect of that federal exemption is to relieve those aircraft from state regulation as well. There is nothing expressly or impliedly contained in Public Law 85-726 that supports such a conclusion. And, absent any statutory prohibition, it is entirely proper that the State be allowed to set up its own system of regulation and control of such aircraft as are not governed by federal provisions. This, in my opinion, is what the Legislature intended to accomplish by adopting the registration procedures of § 49.

The statutory framework must be considered in two parts. The first part, contained in § 49 itself, regulates the registration of aircraft, setting forth the limitations of its coverage in paragraph (e). Similarly, the provisions contained in sections 49B to 49R are limited by exemptions appearing in section 490.

To determine the scope of the exemption of § 49(e) (4), it is useful to compare the language contained therein to that of § 490. The language of § 49(e) (4) provides an exemption solely for aircraft "engaged principally in federally certificated scheduled . . . operation." Section 490, however, provides that:

"Sections 49B to 49R, inclusive, shall not apply to . . . any aircraft owned or being operated by a public carrier engaged principally in regularly scheduled interstate or foreign air transportation for hire under either a federal certificate of public convenience and necessity or under a

letter of registration or exemption order issued by the civil aeronautics board. . . ." [Emphasis added.]

A comparison of these two exemption provisions demonstrates the limited scope of the exemption provided in § 49(e)(4). While the language of § 49(e)(4) is confined strictly to the exemption of "federally certificated scheduled airline operations," the exemption of § 490 not only includes those aircraft, but also specifically encompasses aircraft owned and operated under an exemption order.

It is my opinion that the specific absence in the exemption provision of § 49(e), of aircraft operating under an exemption order, is a clear indication of legislative intent that such aircraft be subject to state control. Accordingly, the registration requirement of § 49 does apply to such aircraft, although the provisions of § 49B to § 49R would not be applicable.

The answer to your specific question is, therefore, in the affirmative. Unless otherwise able to exempt itself, an aircraft holding a safety operating certificate must register that certificate in accordance with the procedures set forth in § 49. In the absence of a certificate of public convenience and necessity, either by virtue of a federal exemption or otherwise, such an aircraft is not "an aircraft engaged principally in federally certificated scheduled airline operation," and is consequently not entitled to exemption under § 49(e)(4).

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Commissioner of Administration and Finance, under G. L. c. 7, § 30K, is permitted to certify rates to the various departments, boards or commissions of the Commonwealth purchasing care in hospitals, sanatoria and infirmaries or reimbursing cities and towns for such care only once in any year.

AUGUST 30, 1965.

HON. JOHN J. MCCARTHY, *Commissioner of Administration and Finance*.

DEAR COMMISSIONER MCCARTHY:—You have requested my opinion regarding an interpretation of G. L. c. 7, § 30K. Specifically you ask whether at this time you may, pursuant to G. L. c. 7, § 30K, certify to each of the various departments, boards, or commissions of the Commonwealth purchasing care in hospitals, sanatoria and infirmaries or reimbursing cities and towns for such care, rates which will reflect reasonable hospital costs or charges made to the general public, whichever is the lower.

In your request you state that on January 14, 1965, the Director of the Bureau of Hospital Costs and Finance certified to the Commissioner of Administration and Finance the all-inclusive per diem costs and charges for public ward accommodations. On February 4, 1965, you certified emergency rates under the provisions of G. L. c. 30A, § 2(3) and filed the same with the Secretary of State. The request further states

that on February 25, 1965, a public hearing was held concerning welfare rates and that, thereafter, on April 30, 1965, you certified the same rates as previously promulgated on February 4, 1965, and once again filed the same with the Secretary of State.

G. L. c. 7, § 30K states that:

"The commissioner shall certify annually . . . such rates . . . as will reflect reasonable hospital costs or charges made to the general public, whichever is the lower. . . ."

It would appear from an examination of this section that the Commissioner is empowered to certify rates only once a year. This is the common meaning of the term "annually" as it is defined in *Webster's Dictionary*. The language contained in the entire section 30K would seem to indicate the same result. In the first paragraph of section 30K appear the words "at least as often as annually," and in the last paragraph appear the words, "at least annually." It must be assumed that the Legislature was aware of the different terminology used in section 30K when referring to the "annual" requirements for the certification of rates and the "at least annual" requirements for the certification of per diem costs.

Furthermore, it is quite evident that the legislative purpose in restricting the Commissioner to an annual certification of rates was to allow both the Commonwealth and the hospitals to anticipate future reimbursements based on established yearly rates. If it were possible to alter, amend or adjust the rates then neither party would be able to accurately prepare budgetary requirements.

I recognize that because of the present accounting procedures used by some hospitals and because of the ever fluctuating change in the costs and charges of treating welfare patients, rates certified at the beginning of a year may not reasonably reflect the lower of costs or charges at some later period during the year. For these reasons, I can appreciate that the Commissioner of Administration and Finance might desire to raise or lower the rates depending on circumstances arising after the original certification. This, however, is a matter for the future determination of the Legislature since at the present it is not, in my opinion, permitted under the provisions of G. L. c. 7, § 30K.

The Commissioner is required under G. L. c. 7, § 30K to certify rates which reflect the lower of the reasonable hospital costs or charges. Since these rates have been held to be regulations within the meaning of G. L. c. 30A, § 1(5), it is incumbent upon the Commissioner to fully comply with the provisions of G. L. c. 30A. *Massachusetts General Hospital v. City of Cambridge*, 1964 Ad. Sh. 843, 846. In order, therefore, to answer the questions which you have asked it is necessary not only to determine the meaning of the term "annually" but also to determine whether annual rates have been certified and filed according to the provisions of G. L. c. 7, § 30K and G. L. c. 30A.

The rates certified on February 4, 1965, were emergency rates issued under the provisions of G. L. c. 30A, § 2(3). The reasons for adopting such emergency rates were contained in the letter of transmittal to the Secretary of State dated February 4, 1965. A reading of the transcript of the public hearing held on February 25, 1965, indicates that the

emergency rates were based in part on data supplied by some hospitals for the year ending September 30, 1963.

The emergency rates of February 4, 1965, cannot qualify as the annual rates since by statute they are effective for only three months. Further, in order for the hearing requirements of G. L. c. 30A, § 2 to have any meaning the Commissioner must possess the power to alter or amend the emergency rates as a result of evidence presented at the hearing.

The rates certified on April 30, 1965, do not appear to have been promulgated under the emergency provisions of G. L. c. 30A, § 2. In the letter of transmittal you indicate that pursuant to G. L. c. 7, § 30K, you have certified such rates as will reflect reasonable hospital costs or charges made to the general public, whichever is the lower and further that a hearing was held on February 25, 1965, to determine such rates.

I am aware that at the time of the public hearing there was a great deal of discussion about the lack of current statistics concerning the costs and charges of the various hospitals. It may well be that if more up-to-date information had been available at the hearing, different rates might have resulted. However, this possibility is not sufficient to overcome the presumption that the rates certified on April 30, 1965 were promulgated according to the requirements of G. L. c. 7, § 30K and G. L. c. 30A.

It is my opinion that under G. L. c. 7, § 30K, the Commissioner of Administration and Finance is permitted to certify rates to the various departments, boards or commissions of the Commonwealth purchasing care in hospitals, sanatoria and infirmaries or reimbursing cities and towns for such care only once in any year. It therefore follows that having properly certified annual rates on April 30, 1965, you may not at this time certify new rates.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Section 1 of Chapter 32, Acts of 1958, cannot be presumed to impose a so called "veto" provision to expenditure of funds authorized and appropriated by the 1958 Highway Bond Act.

AUGUST 30, 1965.

HON. ELLIOT L. RICHARDSON, *Lieutenant Governor of the Commonwealth*.

Re: *Attorney General Opinion 9 July 1965 and Acts of 1958, Chapter 32 Section 1.*

DEAR SIR:—By your letter of August 24, 1965 on behalf of the Executive Council my opinion has been requested on whether or not Section 1 of Chapter 32, Acts of 1958 affects the conclusions set forth in my opinion of July 9, 1965 to the Commissioner of Public Works. Attached to your letter was a copy of a letter dated August 11, 1965 from the Comptroller to the Executive Council raising the question propounded by you.

In the preparation of my opinion of July 9, 1965 careful consideration was given to all General and Special Laws pertinent to the questions

being considered and the accelerated Highway Program including Chapter 32 of the Acts of 1958.

It is my opinion that Chapter 32, Acts of 1958 is not in conflict with and does not affect the conclusions set forth in my July 9, 1965 opinion to the Commissioner of Public Works.

In his letter of August 11, 1965 to the Council the Comptroller quoted only the last sentence of Section 1, Chapter 32 of 1958. Deliberate consideration of all of said Section 1 is necessary. It reads as follows:

"Section 1. Section 1 of chapter 718 of the acts of 1956 is hereby amended by striking out the second paragraph and inserting in place thereof the following paragraph:—

The department and the commission shall accept any federal funds for such projects, and such funds, when received, shall be credited to the Highway Fund, provided, however, that federal funds received on account of allocations as provided in section one of chapter four hundred and three of the acts of nineteen hundred and fifty-four to the amount of sixty-seven million dollars shall be used as provided in said section one of said chapter four hundred and three. Prior to the anticipated receipt of federal funds in excess of said sixty-seven million dollars there is hereby authorized to be expended by the department, without further appropriation, an amount not to exceed two hundred million dollars for projects described in the first paragraph of this section. Funds authorized to be expended in this paragraph are to be in addition to funds authorized in the first paragraph of this section, and to funds authorized by the provisions of chapters three hundred and six of the acts of nineteen hundred and forty-nine, six hundred and eighty-five of the acts of nineteen hundred and fifty, five hundred and fifty-six of the acts of nineteen hundred and fifty-two and four hundred and three of the acts of nineteen hundred and fifty-four, and all of said acts and this act shall be construed so as to supplement one another."

Section 1 of Chapter 32 of 1958 amends Section 1 of Chapter 718 of 1956 by substituting a new second paragraph therein. It first refers to Section 1 of Chapter 403 of 1954 to identify certain highway projects on which the expenditure of an additional sixty-seven million dollars is authorized over and above the one hundred and fifty million dollars authorized by said Section 1, Chapter 403 of 1954 when enacted. The first sentence of Section 1, Chapter 32 of 1958 excludes sixty-seven million dollars of anticipated Federal funds from Chapter 718 of 1956 and directs that sum to be spent on the projects included in Section 1, Chapter 403 of 1954, thereby making available a total of two hundred and seventeen million dollars for said 1954 projects.

Section 1, Chapter 32 of 1958 authorizes the acceptance and use of anticipated Federal contributions to the Highway Fund. That general authority and its specific application to the projects of Section 1, Chapter 403 of 1954 are included in the first sentence of Section 1, Chapter 32 of 1958. The second sentence authorizes the expenditure of two hundred million dollars of anticipated Federal funds for the projects included in the first paragraph of Section 1, Chapter 718 of 1956. The last sentence of Section 1, Chapter 32 of 1958 continues to refer to the

application of anticipated Federal funds, and makes it clear that the expenditure of those anticipated Federal funds is in addition to and supplements the authorizations included in the listed statutes as first enacted. By the language of the last sentence of Section 1, Chapter 32 of 1958 the Legislature also authorized the expenditure of the State funds originally authorized and dedicated by the statutes specifically referred to therein, but which might prove to be not necessary and therefore surplus to the completion of the projects authorized by the same statutes, to complete projects authorized by the other specifically identified statutes.

Article XLII of the Amendments to the Constitution of the Commonwealth provides in Section 4:

“Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.”

That amendment required the Legislature to enact Chapter 32 of 1958 to achieve the purposes set forth in that statute. Without said Chapter 32 or similar legislation neither the anticipated Federal funds nor any surplus from original appropriations of State funds for projects set forth in one Highway Bond Act could be used to supplement funds appropriated for projects authorized by another Highway Bond Act. Amendment XLII limits the purposes for which borrowed money may be used for either the purpose for which it was borrowed or to repay the loan. In the absence of Chapter 32 of 1958, Federal funds received on the projects authorized by Section 1, Chapter 403 of 1954 would be required to be used either for those projects or to repay the highway bonds authorized by the same statute. (Volume V Opinions of Attorney General 1917-1920 page 491 and 492.)

It is my opinion that Chapter 32, Acts of 1958 properly releases the proceeds of the Highway Bond Acts enumerated therein from the restrictions of Section 4, Article XLII, Amendments to the Constitution so that surplus funds of any of those bond issues may be used to supplement other bond issues and may be expended on projects authorized by any one of the other Highway Bond Acts listed therein.

As it relates to Chapter 403 of 1954 it is apparent that Section 1, Chapter 32 of 1958 has two results. It increases by sixty-seven million dollars the funds available for the projects authorized by Section 1, Chapter 403 of 1954 and to be administered in accordance with all of the provisions of that statute. It also authorizes the expenditure on projects authorized by the other Highway Bond Acts listed therein of any funds not needed for the completion of those projects authorized by the 1954 Act.

Section 1, Chapter 32 of 1958 does not deal with any subject other than those previously set forth herein. It does not amend any of the administrative provisions of any of the Highway Bond Statutes to which it refers. It adds to and supplements the amounts of money to be administered under the provisions of those Acts, specifically in the cases of Chapter 403 of 1954 and 718 of 1956 and generally for the others. The language of Section 1, Chapter 32 of 1958 does not incorporate by reference or by any other means all of the provisions of each of the

specifically identified Highway Bond Acts into all other such statutes. The definite supplementary financial arrangements it does authorize would not otherwise be possible because of Section 4, XLII of Amendment, Constitution of the Commonwealth.

There is no specific provision in Chapter 32, Acts of 1958 requiring municipal approval of the highway expenditures which it authorizes. It does not amend Chapter 403 of 1954 by adding thereto Section 4A of Chapter 718 of 1956 or similar language. It is to be noted that by the inclusion therein of the words, "under this act," said Section 4A, Chapter 718 of 1956 can be applied only to that statute. Chapter 403, Acts of 1954 contains no so-called "veto" provision.

It must be noted that the four Bond Issues enacted after Chapter 32, Acts of 1958 contained in the first sections thereof language similar to and intended to achieve the same purpose as Section 1, Chapter 32, Acts of 1958. Reference is made to Section 1, Chapter 528, Acts of 1960 and Section 1, Chapter 590, Acts of 1961, and paragraph 2, Section 1, Chapter 782, Acts of 1962, and paragraph 2, Section 1, Chapter 822, Acts of 1963. However, there is one important difference between the language of Chapter 32 of 1958 and the subsequent Acts. In all statutes the appropriations and authorizations are described as supplementing other enumerated Bond Issues. In the Highway Bond Acts of 1960, 1961, 1962 and 1963 the supplementary appropriations and authorizations are "... available subject to the same conditions . . . as funds authorized in chapter seven hundred and eighteen of the acts of [1956]" That quotation or any similar language is not contained in Chapter 32, Acts of 1958. It is evident that the Legislature deemed it necessary to use such language to subject subsequent Bond Issues to the conditions of Chapter 718, Acts of 1956. It must be concluded from the absence of such language from Chapter 32, Acts of 1958 that the Legislature did not intend that all of the conditions of Chapter 718, Acts of 1956 be applicable to Chapter 403, Acts of 1954 and prior Highway Bond Acts.

In Section 4, Chapter 591, Acts, 1961 and Section 12, Chapter 782, Acts, 1962, and Section 9, Chapter 822, Acts, 1963 the Legislature included a so-called "veto" provision in addition to the supplementary appropriations and authorizations under the conditions set forth in the first section of each statute. The absence of that specific section or language from Chapter 32, Acts, 1958 cannot be ignored. It cannot be presumed that the Legislature intended to impose conditions in Chapter 32, Acts, 1958 and through it on Chapter 403, Acts, 1954 by omitting the language it considered necessary to apply such conditions to the expenditure of funds authorized and appropriated by other Highway Bond Acts.

This letter supplements my July 9, 1965 opinion to the Commissioner of Public Works which is incorporated herein by reference. In particular your attention and that of the Council is respectfully invited to my opinion on the validity of the takings by eminent domain of the property with which that letter and this are concerned. They are valid. The Commonwealth has both constitutional and statutory obligations to pay compensation therefor promptly in fair and reasonable amounts.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Attorney General is required to defend tort actions involving military members of the National Guard when they are using vehicles owned by the Commonwealth or allocated to it under one of the emergency situations covered by § 89 of chapter 33 M.G.L. All non-military personnel of the National Guard are on the same footing as other employees of the Commonwealth and the Attorney General must defend them against tort actions arising out of the authorized operations of vehicles owned by the Commonwealth.

SEPTEMBER 1, 1965.

MAJOR GENERAL JOSEPH M. AMBROSE, *Adjutant General*.

DEAR GENERAL AMBROSE:—I am in receipt of your request for my opinion on the following questions:

“1. In view of the decision in the Levin case, must the Commonwealth of Massachusetts now consider Massachusetts National Guard members or technicians to be state employees?

2. Are the provisions of section 3B of chapter 12 limited to private vehicles as distinguished from issued vehicles when used by the armed forces of the Commonwealth in view of its reference to section 55A (presently section 89 (3)) of chapter 33?

3. Are the provisions of section 3B of chapter 12 limited to those defined by the present sections 4 and 10 of chapter 33 (added by chapter 590 of the acts of 1954) instead of sections 2 and 6(a) of chapter 33 (amended by chapter 425 of the acts of 1939) that was in effect when section 3B of chapter 12 was amended by chapter 409 of the acts of 1943 in view of the broad language of this latter amendment?

4. Are the provisions of section 3B of chapter 12 limited to the type of technicians defined in section 4 of chapter 33 as amended by chapter 408 of the acts of 1963 in view of the fact that there are other types of technicians?

5. In the event of an action or claim by a third party against the Commonwealth, as distinguished from an action or claim against an officer or soldier of the military forces, arising out of the performance of a lawfully ordered military duty by such officer or soldier, but not limited to that arising out of the operation of a motor vehicle, would the provisions of section 3A of chapter 12 apply?

6. In the event of an action by a third party against a Massachusetts National Guard member arising out of his training or against a technician acting within the scope of his employment, under what conditions, if any, will the Commonwealth provide legal representation?

7. In the event of a claim by a third party against a Massachusetts National Guard member arising out of his training or against a technician acting within the scope of his employment, under what conditions, if any, will the Commonwealth provide legal representation?”

Section 3B of chapter 12 of the General Laws requires the Attorney General to defend “any officer or employee of the Commonwealth . . .

against an action for damages for bodily injuries, including death at any time resulting therefrom, or for damage to property, arising out of the operation of a motor or other vehicle owned by the Commonwealth. . . ." This section also requires the Attorney General to be satisfied that the "officer or employee was . . . acting within the scope of his official duties or employment, or was especially assigned by his superior to operate (the) motor vehicle."

Under this section all employees of the Commonwealth are covered. Since members of the Massachusetts National Guard are employees of the Commonwealth, they too come under this section. Similarly, "caretakers" and "technicians" employed to care for National Guard equipment are also employees of the Commonwealth. Those falling into this second group were previously considered federal employees, but under the recent case of *Maryland v. United States*, (May 3, 1965) the United States Supreme Court held that persons employed by the National Guard in civilian capacities are state employees for the purposes of tort claims.

In addition to covering actions arising out of the operation of vehicles owned by the Commonwealth, section 3B of chapter 12 provides in its second paragraph that:

"For the purposes only of this section, an officer, or soldier of the military forces of the Commonwealth, as defined in chapter 33, shall while performing any lawfully ordered military duty be deemed to be an officer or employee of the Commonwealth and a motor vehicle given to the Commonwealth, loaned to it or hired or purchased by it under section fifty-five A of chapter thirty-three shall, while being used in the performance of any lawfully ordered military duty, be deemed to be a motor vehicle owned by the Commonwealth."

Section 55A of chapter 33 was originally enacted by St. 1943, c. 409. In the general revisions of chapter 33 which occurred in 1954 (St. 1954, c. 590), this section was re-enacted as section 89 of chapter 33. The section provides as follows:

"Section 89. Under an order issued by the commander-in-chief, the adjutant general, in the name and on behalf of the Commonwealth, may, for military use, accept the gift or loan of a motor vehicle, or the grant of the temporary right to the use and control of a motor vehicle, or hire or purchase a motor vehicle in the event—

1. An enemy at war with the United States shall commence or threaten operations to endanger the peace or safety of the Commonwealth; or . . .

2. Of tumult, riot, mob, natural disaster, or public catastrophe within the purview of section forty-one or forty-two; or . . .

3. Any unit of the armed forces of the Commonwealth shall be directed or authorized by order of the commander-in-chief to participate or engage in any military training, exercise or duty in which the use of motor vehicles in excess of the number issued to such unit may be required."

The combined effect of chapter 12, section 3B and of chapter 33,

section 89 is to require the Attorney General to defend tort actions involving military members of the National Guard when they are acting within the scope of their authority and when they are using vehicles owned by the Commonwealth or allocated to it under one of the emergency situations covered by section 89.

All non-military employees of the National Guard are on the same footing as other employees of the Commonwealth. The Attorney General must defend them against tort actions arising out of the authorized operations of vehicles owned by the Commonwealth. The only difference between their status and that of military members of the National Guard is that non-military employees are not covered when driving vehicles acquired under section 89 of chapter 33.

Under section 3A of chapter 12 the Attorney General is authorized to settle certain small claims against the Commonwealth itself up to one thousand dollars. In cases where there is no "other mode of redress provided by law" this section may apply to claims arising from torts committed by officers and soldiers of the National Guard.

Section 3C of chapter 12 operates along lines similar to section 3B. This section permits the Attorney General to investigate and settle claims without suit against employees of the Commonwealth up to five hundred dollars arising out of the authorized operation of vehicles owned by the Commonwealth. Both civilian and military employees of the Massachusetts National Guard are covered by this section.

It should be carefully noted that the application of sections 3B and 3C of chapter 12 is limited to claims or actions arising out of the operation of vehicles *owned by the Commonwealth* or acquired under the provisions of chapter 33, § 89. A vehicle owned by the U.S. government and simply allocated to the National Guard is not owned by the Commonwealth. On the other hand, since it is generally issued to a National Guard unit as part of its usual equipment, it does not qualify as a vehicle "in excess of the number issued to such unit" within the meaning of section 89 of chapter 33. Therefore, the Attorney General is not obligated to defend, settle, or pay any claim arising out of the operation of a federally-owned vehicle which is part of the ordinary equipment of a National Guard unit. When such a vehicle is involved in an accident, the driver is not protected by sections 3B or 3C of chapter 12 as they presently stand. This exclusion applies to both military members and civilian employees of the National Guard.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The power of the commission regarding appeals from the Director's review of examination grades is strictly limited in accordance with the requirements of G. L. c. 31, § 12A, as amended by Chapter 261 of the Acts of 1965. The commission does not have authority to grant permission to an applicant to file an appeal after the lapse of the statutory time period.

SEPTEMBER 1, 1965.

HON. HUGH MORTON, *Chairman, Civil Service Commission.*

DEAR MR. MORTON:—I have received your letter of July 13, 1965, requesting my opinion regarding the authority of the Civil Service Commission to hear appeals from the marking of examinations after the statutory time for entertaining such appeals has elapsed. You have asked me—in view of recent statutory enactments—generally to define the jurisdiction of the Civil Service Commission to hear such appeals.

The relevant statutes are as follows:

Chapter 261 of the Acts of 1965 provides in part:

“Not later than fourteen days after the giving of notice of the results of a written examination, an applicant may file with the director a request for a review of the markings in his examination. . . . The director shall decline to accept a request for a review of marking in any case where the applicant's marking in any subject of the written examination is more than twenty per cent below the established passing requirement for that subject. . . . Not later than fourteen days after receipt of notice of the decision of the director, the applicant may appeal to the commission. . . . No request by an applicant for a review of any of the markings on his examination paper shall be accepted by the commission, and no hearing shall be held or other action be taken relative thereto other than on an appeal from a decision of the director.”

General Laws Chapter 31, Section 2(b) grants broad powers to the Commission to “hear and decide all appeals from any decision or action of, or failure to act by, the director, upon application of a person aggrieved thereby.”

Thus, the General Court has set out a specific method by which appeals may reach the Commission. The Commission may hear only appeals from decision of the Director. In addition, these appeals must be seasonably (“not later than fourteen days after receipt of notice of the decision of the director”) filed with the Commission. The jurisdiction of the Director is similarly limited—*i.e.*, he may review all examination markings filed “not later than fourteen days after the giving of notice of the results of a written examination.” There is one further limitation on the Director's review power; namely, he may not review the examinations of those applicants whose score is more than twenty per cent below the passing requirement in any subject.

These provisions must control despite the broad language contained in c. 31, § 2(b). General principles of statutory construction dictate that St. 1965, c. 261 and G. L. c. 31, § 2(b) be read together. A specific statute enacted with reference to the needs of a particular group (here,

all persons whose examination markings the Director may review) prevails over previous general statutes regulating broad categories of persons (here, all persons involved in any matter which the Director may hear under the purview of § 2 (b)). *Clancy v. Wallace*, 288 Mass. 557 (1934). The particular provision must prevail as an exception to the general enactment. This rule of construction is especially applicable when, as here, the particular statute was enacted subsequent to the general one. As the court said in *Walsh v. Commissioners of Civil Service*, 300 Mass. 244 (1938), (holding that the employees of a city hospital created by a special statute enacted after c. 31 were covered by Civil Service):

“It is to be presumed that the General Court in enacting said c. 134 [establishing the hospital] was not unmindful of the general civil service law (citing cases). If reasonably practicable, it is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law (citing cases). Statutes ‘alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there be some positive repugnancy between them.’ *Brooks v. Fitchburg and Leominster St. Ry.*, 200 Mass. 8, 17.”

In the present case, there is no “positive repugnancy” between St. 1965, c. 261 and G. L. c. 31, § 2(b). Thus, it is my opinion that the power of the Commission regarding appeals from the Director’s review of examination grades is strictly limited in accordance with the requirements of c. 261. The Commission does not have authority to grant permission to an applicant to file an appeal after the elapse of the statutory time period. Nor has the Commission the power to require the Director to grant review in cases where the markings are more than twenty per cent below the passing grade. I reach this conclusion irrespective of whether G. L. c. 31, § 12A contains the phrase “within fourteen days” or is changed to read “not later than fourteen days.”

Such strict construction of the requirements of c. 261 is also supported by considerations of public policy. Allowing the Commission discretion to vary the directives of c. 261 under c. 31, § 2(b) might open the door to favoritism or discriminatory practices. In light of the clear mandate of c. 261, it would seem that the Legislature desired to prevent even the slightest chance of such practice. Thus, until a specific grant of discretionary powers to the Commission in this area is made by the General Court, it is my opinion that the duty of the Commission to hear appeals from matters involving examination markings must be exercised in strict compliance with St. 1965, c. 261.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Any individual, including members of the Board of Registration of Professional Engineers and Land Surveyors, may bring a complaint duly sworn to, before said Board, as provided by § 81P of c. 112 of the G. L. The Board cannot revoke a certificate of registration unless it has complied with the statutory formalities.

SEPTEMBER 10, 1965.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MRS. SULLIVAN:—I am in receipt of your request for my opinion on several questions raised by the Board of Registration of Professional Engineers and of Land Surveyors. The questions are principally concerned with the proper means of initiating a proceeding to revoke a certificate of registration.

Chapter 112, section 81P of the General Laws provides in part:

“The board may revoke the certificate of registration of any registrant who is found guilty of:—

(a) The practice of any fraud or deceit in obtaining a certificate of registration; or

(b) Any gross negligence, incompetency or misconduct in the practice of professional engineering or land surveying as a registered professional engineer or as a registered land surveyor.

Any person may prefer charges of fraud, deceit, gross negligence, incompetency or misconduct against any registrant. Such charges shall be in writing, shall be sworn to by the person making them and shall be filed with the secretary of the board.”

The Board of Professional Engineers and of Land Surveyors has asked whether all revocation proceedings must be initiated by a sworn complaint or whether the Board can hold a hearing on the basis of information which it has received in a less formal manner.

In particular the Board has requested my opinion concerning the following three situations:—

1. Where the Board has received a letter from the office of the Chief Engineer of the Massachusetts Land Court, listing the names of certain Registered Land Surveyors and/or Registered Professional Engineers, and stating that the listed individuals have been barred from submitting plans to that Court;

2. Where a previous hearing had been terminated upon the registrant's promise to comply with proper procedures, and where the Board has now received evidence that the registrant has not complied;

3. Where a registrant's professional conduct has been put in doubt during testimony at another hearing on a different matter.

In all three of these situations the Board has made no mention of a sworn complaint. Such a deficiency must necessarily invalidate any revocation hearing which is subsequently held without the deficiency being cured. It was the clear intent of the General Court to require a sworn statement in order to protect engineers and surveyors from frivolous or harassing complaints. The Board cannot, therefore revoke a

certificate of registration unless it has complied with the statutory formalities.

The Board should notice, however, that the statute does not prohibit the chairman or a board member from filing a complaint himself, and it does not require that the complainant have personal knowledge of the facts alleged. The purpose of the statutory requirements is to emphasize the serious nature of a revocation hearing and to make certain that such a proceeding is not lightly undertaken.

Accordingly, it is my opinion that an individual, including Board members, may bring a complaint duly sworn to, before the Board of Professional Engineers and Land Surveyors, as provided by Section 81P of Chapter 112 of the General Laws.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The title to the property known as "Wood Island or World War Memorial Park" is in the Massachusetts Port Authority and the administration and use thereof are under the jurisdiction of that authority.

SEPTEMBER 13, 1965.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth*.

DEAR GOVERNOR VOLPE:—By your letter dated August 16, 1965 my opinion has been requested on the following questions:

"1. Has Chapter 528 of the Acts of 1953 relating to the so-called Wood Island or World War Memorial Park been duly implemented so that said Metropolitan District Commission at any time validly had care and control of said Park despite the failure of the Governor and Council to approve the transfer of said Park to the Metropolitan District Commission?"

"2. If the answer to the first question is in the affirmative, are the provisions of Chapter 528 of the Acts of 1953 requiring action of the Governor to transfer 'care and control' of said Park to the Massachusetts Port Authority (successors in title to State Airport Management Board) still applicable despite the passage of Chapter 465 of the Acts of 1956, as amended, creating the Massachusetts Port Authority and providing for vesting in it title to and possession of the 'airport properties' and responsibility for control, operation and maintenance thereof?"

Prior to 1954, title to World War Memorial Park belong to the City of Boston. On August 2, 1954, it was conveyed to the Commonwealth by a so-called Deed of Exchange executed on that date by the Mayor of Boston and the Massachusetts Department of Public Works, acting on behalf of the Commonwealth. The conveyance was made under the authority conferred by Chapter 431 of the Acts of 1949. The Deed recited compliance with that statute including the requirement that "the Commissioner of Airport Management, with the approval of the State

Airport Management Board, has certified to the State Department of Public Works that the estate owned by the City of Boston and known as World War Memorial Park . . . are necessary for the purposes of the General Edward Lawrence Logan Airport. . . ." The final paragraph of Section 1 of said Chapter 431 of the Acts of 1949 provided that "*all land and rights conveyed to the commonwealth by said city by any deed of exchange under this act shall forthwith upon such conveyance, become a part of the General Edward Lawrence Logan Airport and subject to all laws pertaining to said airport.*" [Emphasis added.]

The instrument of transfer between the Board of Park Commissioners of the City of Boston and the Metropolitan District Commission dated June 30, 1953 does not affect the conveyance of August 2, 1954. The June 30, 1953 instrument stated on its face that it was made pursuant to General Laws (Ter. Ed.) Chapter 92, Section 87 that it transferred care and control to the Metropolitan District Commission, and "That said transfer is subject to Chapter 431 of the Acts of 1949. . . and shall continue to effect only until the land hereby transferred is acquired by the Commonwealth of Massachusetts under said Chapter 431 of the Acts of 1949, *at which time the transfer hereby effected shall, without further action of the parties hereto, automatically terminate; . . .*" [Emphasis added.] By its own terms the June 30, 1953 instrument ceased "automatically" to have any effect when the Park was conveyed to the Commonwealth by the Deed of Exchange dated August 2, 1954.

Chapter 528 of the Acts of 1953 provided that at the time of the conveyance under Chapter 431 of the Acts of 1949, notwithstanding the provisions of said Chapter 431, *with the approval of the Governor and Council*, "care and control" of the Park shall be transferred to the Metropolitan District Commission until such time as the Governor and Council, upon request of the State Airport Management Board, directs its transfer to said Board for airport purposes. [Emphasis added.] Chapter 528 of the 1953 Acts was not self-implementing. Approval by the Governor and Council was a pre-condition to transfer of care and control to the Metropolitan District Commission. The Governor and Council did not approve transfer of the Park to the Metropolitan District Commission. The August 2, 1954 Deed of Exchange does not contain any language transferring care and control of the Park to the Metropolitan District Commission. I can find no other record that care and control was transferred to the Metropolitan District Commission.

It is my opinion that legal control of the Park remained where it was transferred by authority of Chapter 431 of the Acts of 1949 and the Deed of Exchange dated August 2, 1954. Chapter 431 of 1949 provided that it would be a part of the General Edward Lawrence Logan Airport and subject to all laws pertaining to said airport. It appears that there could be no more explicit legislative delegation of administrative control. The Park was to be under the jurisdiction of the state agency administering the airport, which in 1954 was the Airport Management Board, an agency of the Massachusetts Department of Public Works.

The action necessary to transfer care and control of the Park to the Metropolitan District Commission under Chapter 528 of the Acts of 1953 was not taken. It is therefore unnecessary to consider the effect of said

Chapter 528 had it been properly implemented. However, it must be noted that Chapter 528, Acts of 1953 did not amend or repeal the explicit statement in Chapter 431, Acts of 1949 that the Park forthwith upon conveyance to the Commonwealth shall become "a part of the General Edward Lawrence Logan Airport." The public reason for acquisition of the Park by the Commonwealth set forth in the 1949 Act and recited in the 1954 conveyance is that it was necessary for the purposes of the General Edward Lawrence Logan Airport. The 1953 Act, authorizing Metropolitan District Commission care and control of the Park, left in the airport authority the right to secure the land when needed for airport purposes with approval of the Governor and Council. It should also be noted that when the Legislature later permitted acquisition of a small 3,000 foot adjunct to the Park by Chapter 438, Acts of 1955 it designated the Airport Management Board, not the Metropolitan District Commission, as the taking agency. The main legislative purpose was to add that property to the Logan Airport. It was not acquired as part of the Metropolitan District Commission Park system.

As a part of the General Edward Lawrence Logan Airport, World War Memorial Park came within the definition of "airport properties" set forth in Section 1(b) of the Act creating the Port Authority. (Chapter 465, Acts of 1956). The "General Edward Lawrence Logan International Airport" was included in toto in the definition of "airport properties." In 1959 all "airport properties" were transferred to the Port Authority the provisions of said Act.

By Chapter 465, Acts of 1956 the Port Authority is given broad powers to use all the properties transferred to it for its purposes. Section 29 of said Chapter 465 provides that "all other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this Act." That statutory language superseded any limitations set forth in Chapter 528, Acts of 1953 including the requirement that the Governor and Council approve use of the property for airport purposes by transferring to the Port Authority control of all "airport properties."

The fact that the World War Memorial Park has been managed *de facto* by the Metropolitan District Commission with the approval of the State Airport Management Board and the Port Authority does not affect *de jure* control of the property.

It is my opinion that title to the property known as Wood Island or War Memorial Park is in the Massachusetts Port Authority and the administration and use thereof are under the jurisdiction of that authority.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

A bus company which is a public carrier under c. 159A is not covered by the provisions of G. L. c. 161, § 108. Interpretation of c. 71 § 7B, M.G.L., added by c. 563 of the Acts of 1964.

SEPTEMBER 20, 1965.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—You have asked my opinion relative to the interpretation of § 7B of c. 71 of the General Laws added by c. 563 of the Acts of 1964.

In your request you have outlined six specific questions. I think it wise first to review the legislative history of the said § 7B in order to place its import in the proper perspective.

Initially, § 7A of c. 71 of the General Laws was enacted by c. 679 of the Acts of 1947. The purpose of § 7A was to help reimburse our cities and towns for expenses incurred in transporting children to and from school.

There are certain limitations on the reimbursement of pupil transportation costs as set forth in the said § 7A. In brief, they are: the sum paid is only the amount in excess of five dollars per pupil per year paid by a town for school transportation calculated on the basis of the net average membership of the town; the payment is further limited to those pupils living more than one and one-half miles from their school; the amount paid on a per pupil basis for transportation to private schools may not exceed the amount paid for like transportation to public schools; all contracts must be awarded on the basis of sealed bids. When a town accepts a bid other than the lowest, the town must file a written explanation with the Department of Education. Not all the provisions of § 7A are restrictive. The last paragraph guarantees a minimum amount. Under this paragraph, no town shall be paid an amount less than it received in 1946.

Commencing in 1961, unsuccessful legislative efforts were made for additional reimbursement to the cities and towns of a greater portion of pupil transportation costs (Resolves 1961, c. 117; House No. 3939 of 1962; Senate No. 899 of 1962; Senate No. 806 of 1964).

In 1964, the Governor filed a special message relative to the transportation problem in the Commonwealth. Out of this message grew Senate 925, which was engrossed and enacted on June 17, 1964 and became c. 563 of the Acts of 1964. Section 8 of this chapter is now § 7B of c. 71 of the General Laws. It provides as follows:

“To provide for the reimbursement of part of the cost not reimbursable under section seven A incurred directly by a school department or indirectly by a city or town on account of an assessment made to meet the cost of maintaining a public transportation system used for the transportation of pupils in a city or town using public transportation facilities licensed under the provisions of sections one and seven of chapter one hundred and fifty-nine A or operated under the provisions of chapter one hundred and sixty-one A for the transporting of pupils to and from school who reside more than one and one half miles from the school they attend as determined by the commissioner, or, if the

determination of the number of pupils residing more than one and one half miles from the school of attendance is impracticable, the commissioner shall make such determination according to the following formula: From the net average membership in the public and private schools, determined as provided in section five of chapter seventy, the commissioner shall estimate the number of pupils who reside more than one and one half miles from the school they attend, which number shall not exceed ten per cent of said net average membership.

"The commissioner shall on or before November first of each year, certify to the state tax commission a transportation allowance payable to such city or town for the preceding school year, the amount of such allowance to be determined by him by multiplying the number of pupils or the estimated number of pupils residing more than one and one half miles from the school by the average cost per pupil in the city or town for transporting all such pupils; provided that such cost shall not exceed twenty cents per pupil per day.

"Funds received by each city or town shall be used to pay the cost of providing public transportation or to reimburse a city or town for payments on account of any assessment made upon it to meet the cost of maintaining a public transportation system, provided that notwithstanding the provisions of this section, no amount shall be approved as a reimbursement by the commissioner as herein provided in excess of the amount to be paid by such a city or town for such public transportation."

I have reviewed the legislative history of § 7B in order to emphasize that this legislation was not intended to be a general subsidy of public carriers. It was made a companion section to § 7A in c. 71, our General Law relating to education. Had § 7B been intended as a general transportation subsidy, it is proper to assume the Legislature would have included the section in c. 161A—the transportation act it was then enacting.

Accordingly, with the perspective in mind that § 7B is clearly an amendment of our education law dealing with additional reimbursement to the cities and towns "to meet the cost of maintaining a public transportation system used for the transportation of pupils . . . using public transportation facilities" I shall now treat with your questions in the order presented.

"1. What is the meaning of the first paragraph in section 7B of Chapter 71?"

The first paragraph of § 7B hereinabove set forth expresses the legislative intention of reimbursing the cities and towns of the Commonwealth for part of the cost, not reimbursable under § 7A, incurred:

(1) *directly* by their school departments by payments to a public transportation system for the transportation to and from school of school children on the routes of public transportation systems therein which are regularly licensed under G. L. c. 159A, §§ 1 and 7, or operated under G. L. c. 161A; and

(2) *indirectly* by cities and towns through the payment of an *assessment* made to meet the cost of maintaining a public transportation

system, used for the transportation of school children over the routes of public carriers licensed under G. L. c. 159A, §§ 1 and 7, or operated under G. L. c. 161A. (Emphasis supplied).

Both of the above categories are limited by the balance of the first paragraph of § 7B which is largely self-explanatory. Like § 7A, § 7B is restricted to those pupils who live more than one and one-half miles from the school they attend. Unlike § 7A, § 7B provides a rule-of-thumb or approximation for determining those pupils who live outside the one and one-half mile limit where a more precise measurement is impractical. The fact that an estimate of the number of pupils may be used does not relieve the Department of Education, where practical, from making an exact determination. Since § 7A requires a precise, rather than an estimated basis, the figures under § 7A would be available for use under § 7B and should be used for determining payments under the latter section. An approximation cannot be used to enlarge or vary the amount one town should receive vis-a-vis another.

"2. Where the paragraph refers to an assessment, what is the period of the assessment which the Commissioner must use in order that he may be sure that any payment is not in excess of the amount to be paid by a city or town for said public transportation having in mind we reimburse for the school year from September to June?"

The period of assessment referred to is necessarily that assessment imposed on a city or town made to meet the cost of maintaining public transportation used for the transportation of pupils for the calendar year next prior to the school year in question. Since under c. 161A of the General Laws no assessment will be made on those additional cities and towns within the MBTA, as distinct from the old MTA district, they will not be reimbursed under this provision of § 7B until the end of the school year in 1967 and on or before November 1, 1967. With regard to those costs incurred directly by a school department for the transportation of school children living the requisite distance from school on the routes of public transportation systems which are regularly licensed under the provisions of G. L. c. 159A, §§ 1 and 7, or operated under the provisions of G. L. c. 161A, the amount to be considered is the amount paid for such fares for the school year in question commencing with the school year ending 1965.

"3. If a city or town in the old fourteen city and town Metropolitan Transit Authority area has been receiving a transportation allotment based upon section 7A, how should the act be administered in view of the deficit provision which is created under section 7B?"

A city or town in the old fourteen (14) city and town MTA district, which uses the public transportation system for the transportation to and from schools of pupils living the requisite distance therefrom over the routes of the system is entitled to the amount, in addition to its § 7A reimbursement, computed under § 7B. Such additional reimbursement is not to exceed the amount of the assessment made on the city or town for the calendar year next prior to the conclusion of the school year. In addition, such city or town may be reimbursed on account of those costs

incurred directly by its school department for pupil fares on public transportation systems. Both of the above categories are, of course, limited to the maximum reimbursement in § 7B, viz: number of pupils not to exceed ten per cent of the net average membership; cost not to exceed twenty cents per pupil per day; and the amount shall not be in excess of the amount paid by a city or town for public transportation.

"4. If a committee awards contracts to private carriers under section 7A and also gives out tickets to youngsters who ride more than one and one-half miles on a public carrier, how will reimbursement be arrived at in an area (a) outside the Massachusetts Bay Transportation Authority, (b) inside the sixty-four cities and towns, (c) inside the fourteen cities and towns?"

(a). To my knowledge there is only one area (Greenfield and Montague) outside the MBTA area that has accepted the provisions of c. 161, § 143 of the General Laws which provides for transportation areas. Accordingly, the factor of a city or town outside the MBTA area paying an assessment to meet the cost of a public transportation system at this date is minimal.

Assuming no assessment made to meet the cost of a public transportation system in a city or town outside the MBTA area, the community would be entitled to § 7A reimbursement and § 7B reimbursement on account of those costs "incurred directly by a school department . . . for the transportation of pupils in a city or town using public transportation facilities . . . licensed under G. L. c. 159A, §§ 1 and 7."

The computation for reimbursement has been set forth in my answer to your third question subject to the limitations therein set forth.

(b) and (c). The answer to (b) and (c) do not vary from my answer set forth in response to your third question. In the MBTA sixty-four city and town area there will be no assessment until the calendar year commencing January 1, 1966, except for the fourteen cities and towns in the old MTA district. As to the latter fourteen cities and towns, they are presently subject to a deficit assessment and would qualify for § 7B reimbursement for "cost(s) incurred indirectly . . . on account of an assessment made to meet the cost of maintaining a public transportation system used for the transportation of pupils . . . living the requisite distance from school." Inasmuch as the fourteen cities and towns would have an assessment for the calendar year 1964, they would be entitled to § 7B reimbursement on or before November 1, 1965 for the school year ending June 30, 1965 on account of said assessments and any costs incurred directly by their school departments for public transportation.

(b). Will Holbrook be entitled to the difference between \$4,173 which monies being spent under contract with private carriers.)"

Since the town cited incurs costs directly on private carriers alone, G. L. c. 71, § 7B is not applicable.

(b). Will Holbrook be entitled to the difference between \$4,173 which was received under section 7A and the amount of assessment, namely, \$4,400 or to an additional \$227?"

(c). Would Holbrook be entitled to (as some officials of the MBTA

contend) to the difference between \$4,173 received under section 7A and \$18,460.50, the actual amount spent on transportation, or \$14,287?"

My answer to questions (b) and (c) is the same as (a). Where the town uses only private carriers for the transportation of pupils, no reimbursement under § 7B is available.

"6. Is a bus company which is a public carrier under Chapter 159A [a street or elevated railway as those terms are used in Chapter 161, § 108 of the General Laws]?"

The various different public utilities are regulated, in particular, by consecutive chapters of the General Laws. These chapters with their respective headings are divided according to the specific utility which the chapter regulates. Each chapter relates only to that specific public utility unless a contrary intent is clearly discernible in a section or sections within that chapter. Your question is in reference to c. 161 which pertains to street railways.

"Street railways" or "railways" are defined in § 1 of c. 161 as: "a railway, including poles, wires or other appliances and equipment connected therewith, of the class operated by motive power other than steam, and usually constructed upon public ways and places." This definition clearly defines what is better known as a "trolley." If the definition cited above had been intended to include buses, the regulations thereof would logically have been included in that section. Instead, the Legislature inserted c. 159A as the regulatory body of law applying to buses.

Turning directly to § 108 of c. 161, this section extends to school pupils the privilege of riding on street or elevated railroads at half fare. There is nothing in the section itself indicating an interpretation which would include buses within the definition of "railways" or "street railways."

The original provisions of this section may well have been enacted initially as a *quid pro quo* for privileges extended to street railway companies. Those companies formed after the passage of the initial statute naturally were apprised of any liabilities under the section. To extend § 108 to companies operating buses licensed under c. 159A at this time by interpretation, would raise some grave constitutional questions.

This section has been amended at least five times and has not gone uncontemplated by the Legislature. The last time the section was amended was in 1927 and 1928. Travel by bus was well known and fully operative. Had the Legislature intended at the 1927 and 1928 or later sessions to extend the privilege contained in § 108 to travel by bus that intent would have been clearly expressed. Such intent, as yet, has not been expressed but may well be contemplated at some future session. It is, therefore, my opinion that a bus company which is a public carrier under c. 159A is not covered by the provision of G. L. c. 161, § 108.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Persons who apply pesticides for the benefit of others must be licensed in accordance with G. L. c. 94B, § 21C. Those persons, and their servants and employees who apply pesticides in conjunction with their own private operations, or as incidental to their normal duties as servants and employees of such person, are exempted from the licensing requirements.

An employee of the Commonwealth, applying a pesticide on land under the jurisdiction and control of his department need not be licensed. The portion of § 21C which requires governmental agencies to be licensed restricts itself to only those agencies which apply pesticides "on the land of another."

SEPTEMBER 22, 1965.

HON. GEORGE A. MICHAEL, SC. D., *Chairman, Pesticide Board, Department of Public Health.*

DEAR SIR:—I am in receipt of your request for my opinion concerning the proper interpretation of c. 94B, § 21C of the General Laws, relating to the licensing of persons who apply pesticides. In substance, you ask the following questions:

1. Does Section 21C of Chapter 94B exempt from licensing those employees of the Department of Mental Health who apply pesticides in the course of farming operations on land owned by the Commonwealth and under the control of the Department?

2. Is a "farmer" totally exempt from licensing, or is he exempt only when applying pesticides to his own land?

3. Is land of the Commonwealth and under the control of the various agencies thereof considered "land of another" within the meaning of the act?

Chapter 94B, § 21C states in part:

"Persons, including governmental agencies and municipal corporations, who apply pesticides, other than by aircraft, on the land of another may be required by the board to be licensed therefor, but the board shall not require a farmer who makes application of pesticides, nor a person who applies pesticides in, on or under any structure whether on land of another or not, to be licensed. . . ."

This section divides persons who use pesticides outside of buildings into two broad groups: those who apply pesticides for the benefit of others, and those who apply pesticides in conjunction with their own private operations. The former must be licensed; the latter are exempted from the licensing requirement.

The statute employs two standards to differentiate the private use from the public use of pesticides. In general, a person who applies a pesticide on land of another is making a public use, whereas a farmer or a person who applies a pesticide on his own land is making a private use.

Confusion results because in some cases the standards will be conflicting or overlapping. Thus, it is a private use when a farmer applies

pesticides on land of another which he leases for the purpose of growing crops, but it is a public use when the farmer makes a part-time business of applying pesticides on the land of others. On the other hand, it is a private use when a servant or employee of a landowner applies a pesticide on the landowner's property as an incidental part of his normal duties.

The portion of § 21C which requires governmental agencies to be licensed restricts itself to only those agencies which apply pesticides "on the land of another." The effect of this provision is to regulate primarily those state, county and municipal agencies which conduct widespread programs of pest control. A typical example would be a county mosquito control board which uses an insecticide, or a town highway department which uses a defoliating agent to clear away roadside brush.

The statute was not intended to regulate agencies of the Commonwealth which make a "private" use of pesticides on land under their jurisdiction. Such a use is similar to that of a landowner or farmer. The immediate benefit falls to the agency rather than to members of the "public" at large. Inasmuch as the use of pesticides by Department of Mental Health employees on property under the control of that department constitutes a "private" use, these employees are exempt from the licensing requirement.

The portion of § 21C excluding "farmers" was not intended to create thereby a blanket exemption for every person who conducts some minimal sort of a farming operation. A farmer is exempt when applying pesticides on his own land, on land he leases, or on land of his employer in cases where he is employed to operate a farm for someone else. As it has already been pointed out, however, a farmer must obtain a license before offering his services to the general public for the purpose of applying pesticides.

The requirement of a license for persons applying pesticides "on the land of another" may at times cause confusion, particularly where the land in question is owned by a corporation or unit of government. Since a corporation or government can act only through its agents, those agents represent the only instrumentalities by which it can perform work on its own land. In the strictest sense, when such agents apply pesticides on property owned by the corporation or government, they are doing so on the land of another. Yet clearly their work is not public; it is private within the scope of the preceding discussion. In legal terminology they are the servants of their employer as opposed to being independent contractors. They perform their duties under the control and direction of their employer, and for many legal purposes their acts are considered to be the acts of that employer.

When an employee of the Commonwealth applies a pesticide on land under the jurisdiction and control of his department, he is acting for the immediate benefit of the Commonwealth rather than for the benefit of a member or members of the general public. He is not engaging in the public business of applying pesticides; he is applying pesticides only on behalf of his immediate employer on the land of that employer. It is this sort of private act which the General Court clearly intended to exempt from the licensing requirements of § 21C. An employee of the Common-

wealth need not therefore be licensed in order to apply pesticides on land under the control of his department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The procedural requirements contained in Chapter 30A of the G. L. are applicable to wage determinations under § 26T of c. 121, M.G.L. Such wage determinations will not be valid unless accompanied by a determination of payments to health and welfare plans.

The commissioner of Labor and Industries may properly require each Housing Authority to furnish employment classifications annually, as a reasonable means of effectuating the mandate of the General Court.

SEPTEMBER 24, 1965.

HON. ROCCO ALBERTO, *Commissioner of Labor and Industries*.

DEAR SIR:—I am in receipt of your request for my opinion concerning the proper interpretation of c. 121, § 26T of the General Laws, relating to the determination of the correct wages to be paid to employees of public housing authorities. Specifically, you ask the following questions:

“1. Are the procedural requirements contained in Chapter 30A of the General Laws applicable to wage determinations made under Section 26T?

“2. Would such wage determinations be valid if they are not accompanied by determinations of payments to health and welfare plans in the event that a housing authority has its own health and welfare plan which I feel is adequate?

“3. Would I be acting within my statutory authority in requiring each housing authority to furnish classifications annually?”

Section 1(5) of c. 30A defines a regulation to include:

“the whole or any part of every rule, regulation, standard, or other requirement of general application and future effect adopted by an agency to implement or interpret the law enforced or administered by it. . . .”

The terms “standard” and “other requirement” clearly include wage determinations under § 26T of c. 121. Such determinations have a “general application and future effect” on all housing authorities within the geographical region involved. Therefore, when making wage determinations under § 26T of c. 121, the Department of Labor and Industries should comply with the procedural requirements of c. 30A, §§ 2 through 8, inclusive.

In answer to your second question, it is my opinion that a wage determination made under § 26T of c. 121 will not be valid unless it is accompanied by a determination of payments to health and welfare plans. Section 26T provides in part:

"The commission shall determine rates of wages and fees and payments to health and welfare plans for each such classification and shall furnish the housing authority with a schedule of such rates, fees and payments. . . ."

The necessity for combining the wage determination with the health and welfare determination is indicated by a portion of c. 149, § 27, one of the two sections which describe the methods by which the Commissioner of Labor and Industries is required to set standards under § 26T of c. 121.

" . . . Any employer . . . who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee. . . ."

C. 149, § 27.

It was the intent of the General Court that standards set by the Department of Labor and Industries should include both wages and benefits, and that no employer should be able to evade the statutory scheme by paying the standard wage rate and yet providing substandard benefits. Within the framework envisioned by the Legislature, the wage and benefit standards are inextricably intertwined. Therefore, when making determinations in accordance with § 26T of c. 121, the Department of Labor and Industries should promulgate standards for both wages and benefits.

In answer to your third question, it is my opinion that the Commissioner of Labor and Industries may properly require each housing authority to furnish employment classifications annually. Section 26T of c. 121 provides in part:

"In the development or administration of a project, a housing authority shall furnish the commissioner of labor and industries, upon his request, with a list of the classifications of work performed by all architects, technical engineers, draftsmen, technicians, laborers and mechanics employed therein, and shall notify him from time to time of any changes in said classifications. . . ."

By this provision the General Court intended to require housing authorities to submit employment classifications and to keep them current by submitting supplementary classifications from time to time. This legislative purpose may be effected in an orderly and sensible manner by the submission of annual reports. The interval will not be so frequent as to inconvenience the housing authorities; neither will it be so infrequent as to jeopardize the rights of employees whose positions are altered or reclassified in the course of a year. The Commissioner of Labor and Industries may therefore require annual reports as a reasonable means of effectuating the mandate of the General Court.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

An airplane, when towed over a way behind a motor vehicle, is not a trailer within the meaning and intent of G. L. c. 90, § 1.

SEPTEMBER 24, 1965.

HON. RICHARD E. McLAUGHLIN, *Registrar of Motor Vehicles.*

DEAR REGISTRAR McLAUGHLIN:—I am in receipt of your request wherein you ask my opinion “as to whether when an airplane is towed over a way behind a motor vehicle it is considered to be a trailer.”

General Laws c. 90, § 1 defines “trailer” in material part as “any vehicle or object on wheels and having no motive power of its own, but which is drawn by, or used in combination with, a motor vehicle. . . .”

An airplane, although it has motive power for purposes of flight in air, is not a motor vehicle within the meaning of that term. *Rich v. Finley*, 325 Mass. 99.

It is doubtful that the Legislature intended that a vehicle, with motive power to fly, in being towed along a highway, could then be considered as a trailer. In the event that a motor vehicle became disabled and was being towed along the highway, it is unreasonable to conclude that merely because it was without motive power of its own for the purpose of travelling along the highway it could be considered as a trailer. Further, an airplane is not customarily “drawn by, or used in combination with, a motor vehicle.”

It is therefore my opinion that an airplane, when towed over a way behind a motor vehicle, is not a trailer within the meaning and intent of G. L. c. 90, § 1.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The Bourne Housing Authority is empowered to purchase property upon which there is a new structure which said authority has determined should be used for housing for the elderly. However, such acquisition can only be made pursuant to the requirements and procedures for doing so found in G. L. c. 121, §§ 26P, as amended, 26S and 26UU.

SEPTEMBER 29, 1965.

HON. JOHN C. CHRISTIE, *Assistant to Deputy Commissioner, Department of Commerce and Development.*

DEAR SIR:—I have received your request of August 30, 1965 for my opinion as to whether the acquisition of certain property by the Bourne Housing Authority would be in accordance with G. L. c. 121. The Authority has the opportunity to purchase property upon which there is a new structure which the Authority has determined should be used for elderly housing.

It is within not only the powers of the Authority but also its purpose to provide housing for the elderly as it is needed.

"The housing authority of each city or town, organized under section twenty-six K, shall have power to provide housing for elderly persons of low income either in separate projects . . . or in remodeled or reconstructed existing buildings. . . ."

G. L. c. 121, § 26TT.

Your letter states that the Bourne Housing Authority has voted to purchase a newly and independently constructed building which has not been previously occupied. There is no question that the Authority could have contracted to have the building constructed specifically for the Authority. [G. L. c. 121, § 26P(b).]

But with regard to existing buildings, the housing authority may provide housing for the elderly in such buildings that are "remodeled or reconstructed." [G. L. c. 121, § 26TT.] However, § 26TT goes on to provide that Part II of c. 121 is to be applicable (except as otherwise provided) to housing projects for the elderly. Found within Part II is § 26P, wherein the powers of a housing authority are set forth. Section 26P empowers housing authorities

"to purchase or lease, or to acquire by gift, bequest or grant, and hold any property real or personal, or any interest therein, found by it to be necessary or reasonably required to carry out the purposes of the Housing Authority Law. . . ." [Emphasis supplied.]

Specifically, one of the purposes of the Housing Authority Law is to satisfy the need for elderly housing, a need which in the language of the General Court is an immediate and pressing one. General Laws c. 121, § 26SS declares that: "a public exigency exists which makes the provision of housing for elderly persons of low income . . . a public necessity." In order to carry out such a purpose of the Housing Authority Law, a housing authority is authorized "to purchase . . . any property. . . ."

It is, therefore, my opinion that the purchase of the building in question by the Bourne Housing Authority would be in accordance with the Housing Authority Law. However, that acquisition can only be made pursuant to the requirements and procedures for doing so found in G. L. c. 121, §§ 26P, as amended, 26S and 26UU.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

There is no liability on the part of the Commonwealth to make payments for delays occasioned by a carpenters' strike, where the contract contains no provisions for compensating the contractor for reasonable delays. The sole method for honoring a moral obligation is for the General Court to enact a special resolve.

SEPTEMBER 29, 1965.

HON. JOHN J. MCCARTHY, *Commissioner of Administration*.

DEAR SIR:—I have received your request for my opinion relating to the Commonwealth's liability to make payments for delays occasioned

during the performance of Contract 20 of State Project U-702 by the contractor, Warner Bros. Inc.

The contract between Warner Bros. Inc. and the Commonwealth entered into on October 21, 1963, was for the extension of water, drainage and sewerage systems at the University of Massachusetts where new structures were in process of construction. The progress of building construction was slowed by a carpenters' strike and a particular building contractor, M. J. Walsh, deemed it advisable to finish his work without any possible interference from Warner Bros. Inc. Accordingly, M. J. Walsh denied Warner Bros. Inc. access to the project. Thus, Warner Bros. Inc. was delayed in performing its contract and now claims damages of \$32,554.58.

Article XI of Contract 20 sets forth the Commonwealth's agreement with Warner Bros. Inc. regarding any and all delays.

"The Bureau [of Building Construction] may delay the commencement of the work, or any part thereof, for any reason if the Bureau shall deem it for the interest of the Commonwealth so to do. The Contractor shall have no claim for damages on account of such delay unless the Director shall otherwise determine, but shall be entitled to so much additional time in which to complete the whole or any portion of the work required under this contract as the Architect shall certify in writing to be just. *The contractor shall have no claim for damages on account of any delay on the part of the Bureau or another contractor in connection with the execution of the work covered by this contract.* The Contractor shall have no claims for damages on account of any delays caused by the work of other contractors of the Bureau now or hereafter doing work upon the premises covered by this contract." [Emphasis supplied.]

Thus, Warner Bros. Inc. has contractually abrogated all possible claims for damages caused by "any delay on the part of the Bureau or another contractor." This language encompasses and intentionally embraces the situation Warner Bros. Inc. now faces, namely, damages suffered because of "delay on the part of . . . another contractor." The building contractor, M. J. Walsh, was delayed in completing his work, and thereby caused Warner Bros. Inc. to fall behind in its schedule.

There is no indication that this delay was willful, arbitrary, or in any way unreasonable. The building contractor, itself delayed by a strike, determined that it should complete its work prior to that of Warner Bros. Inc. The contract contains no provisions for compensating the contractor for reasonable delays. Consequently, the present situation is governed by *Chas. T. Main, Inc. v. Massachusetts Turnpike Authority*, 1964 Adv. Sh. 407.

"By signing a contract which in terms precluded charges for delays, and which did not make (as it could have made) explicit provision to cover additional compensation for reasonable delay, [contractor] incurred the risk of the delays, not found to have been unreasonable, which did occur."

Ibid., p. 416.

It is therefore, my opinion that as a matter of law the contractor's claim is without merit.

Aside from the legal merits of Warner Bros. Inc.'s claim, you have suggested the possibility of a moral obligation to Warner Bros. Inc. which favors its claim.

Inherent in our form of government is the concept that the Legislature has the sole power to recognize or not to recognize moral claims against the government as it so chooses subject to the provisions of G. L. c. 12, § 3A, wherein the Attorney General may make determination on moral claims of less than \$1,000. In this Commonwealth claims against the government must be brought by petition pursuant to G. L. c. 258. This statute, however, does not subject our treasury to the payment of moral claims as, indeed, such was not the object of the legislation. As a result, the sole method of honoring such claim is for the General Court to enact a special resolve. Warner Bros. Inc.'s only recourse is to seek such special legislation. Members of the executive branch of our government may not honor moral claims except as provided by said G. L. c. 12, § 3A, for to do so would be to usurp the legislative role.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Approval by the comptroller of requests for payments, charges for which have been approved by the Governor, with the advice and consent of the Executive Council, is not required. Payments from the treasury must be made on the basis of the warrants which have been approved by the Governor and the Executive Council.

SEPTEMBER 29, 1965.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General*.

DEAR TREASURER CRANE:—I have received your letter of September 8, 1965 which relates to the question of payment of Warrants #480, #513 and #612, each of which has been approved by the Governor and the Executive Council. The warrants in question cover amounts owed by the Commonwealth for takings by the Department of Public Works of certain parcels of land within the City of Boston [Parcels 1 through 6 in Layout No. 5440 (Suffolk)], which parcels fall within the area designated as a route for the so-called "Inner Belt" highway. I have already rendered opinions with regard to these takings to the Commissioner of Public Works (July 9, 1965) and to the Lieutenant Governor of the Commonwealth (August 30, 1965). In each of these opinions I concluded that the takings by the Department of Public Works were valid, and that the Commonwealth was obligated to pay full and fair value therefor.

In your request you refer to § 18 of c. 29 of the General Laws, which provides in part as follows:

"Except as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, *and after the demand or account to be paid has been certified by the comptroller. . .*" [Emphasis supplied.]

Although the warrants in question have been approved by the Governor and Executive Council, the charges contained therein have never been approved for payment by the Comptroller. Accordingly, your letter asks: "... in view of the fact that there is no certification by the Comptroller, can I as Treasurer make payment of the above warrants which have been approved by the Governor and Council."

The requirement which appears in G. L. c. 29, § 18 to the effect that a demand or account may lawfully be paid only after such demand or account has been *certified* by the Comptroller must be interpreted in the light of the procedures developed by the Legislature to govern the functioning of the Comptroller, and on the basis of constitutional and statutory limitations upon the Comptroller's authority. The duties of the Comptroller with respect to examination and certification of accounts and demands against the Commonwealth are set forth in G. L. c. 7, § 13.

"The comptroller shall examine all accounts and demands against the commonwealth (with certain exceptions not relevant to the present matter) . . . The comptroller shall make a certificate specifying the amount due and allowed on each account or demand so examined, the name of the person to whom such amount is payable, and the account to which it is chargeable; and if it appears to him that there are improper charges in said accounts or demands he shall report the same to the governor and council, with a separate certificate therefor. . . ." [Emphasis supplied.]

Thus, in accordance with G. L. c. 7, § 13, the Comptroller may—after his examination of the accounts or demands at issue—prepare a certificate containing information as to the amounts to be paid, the parties who are to receive payment and the accounts to which such payments are to be charged. The preparation of such a certificate and its forwarding to the Governor and Executive Council presumably implies that the Comptroller has no objection to payment of the demands referred to therein.

On the other hand, should the Comptroller believe that certain charges are improper, he is required—under G. L. c. 7, § 13—to prepare "a separate certificate therefor," and to forward the same to the Governor and Council together with a report of his determination that improper charges have been included. The final decision as to whether the amounts questioned by the Comptroller are to be paid or withheld must be made by the Governor, with the advice and consent of the Council, and is not to be made by the Comptroller. *Ward v. Comptroller of the Commonwealth*, 345 Mass. 183, 186.

It is clear that the requirement imposed by c. 29, § 18 that the demand or account be "certified by the comptroller" prior to payment does not—in light of the provisions of c. 7, § 13—mean that payment must be preceded by the Comptroller's approval. In this context, certification refers not to approval, but to the examination of the demand or account, and the preparation and forwarding of a certificate with respect to the request for payment. Such certificate may be the ordinary list of amounts to be paid to which the Comptroller has lodged no objection; or it may be the "separate certificate" required in cases in

which the Comptroller has determined that improper charges have been made. Thus, the Comptroller may "certify" a request for payment (in the sense in which that term is used in c. 29, § 18) simply by forwarding the request on a separate certificate to the Governor and Council with an indication that he believes the request to be improper. Approval by the Comptroller is not necessary for compliance with the certification provisions of c. 29, § 18.

In this way, the constitutional requirement that funds be issued from the State Treasury upon the warrant of the Governor is fulfilled. ("No moneys shall be issued out of the treasury of this commonwealth, and disposed of . . . but by warrant under the hand of the governor for the time being, with the advice and consent of the council. . . ." *Const. of the Comm.*, Pt. 2, c. 2, § 1, Art. XI.) The Supreme Judicial Court has held without ambiguity that the responsibility of deciding whether payment is to be made is vested in the Governor and Executive Council, and that the Comptroller's report has the status of a recommendation only.

" . . . It is clear that the Comptroller himself has no authority to direct the withholding of payments. If he thinks that some charge is improper, it is then his function to report it to the Governor and Council. *This is entirely consistent with G. L. c. § 18. . . .*" [Emphasis supplied.] *Ward v. Comptroller of the Commonwealth, supra. O'Connor v. Deputy Commissioner and Comptroller*, 1965 Mass. Adv. Sh. 329, 331.

The opinion of the Attorney General of July 9, 1965, cited above, reiterates the limitations upon the Comptroller's authority.

In the present case, the Comptroller forwarded the charges in question to the Governor and Executive Council, presumably with a recommendation that the amounts in question not be paid. Having done so, the Comptroller complied with the provisions of c. 7, § 13 and c. 29, § 18; his authority with respect to these warrants was, at that point, exhausted. The Governor—with the advice and consent of the Council—has since approved the request for payment. To rule that approval by the Comptroller must now be obtained as a condition precedent to payment would be to disregard the constitutional authority of the Governor as well as recent decisions of the Supreme Judicial Court; likewise, such a ruling would give to c. 29, § 18 a meaning never intended by the General Court, and one which would place that statute in conflict with constitutional provisions relative to payments from the State Treasury.

Accordingly, it is my opinion that approval by the Comptroller of the requests for payment which you have described is not required, and that payments from the Treasury must now be made on the basis of the warrants which have been approved by the Governor and the Executive Council.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

A temporary officer or employee appointed under G. L. c. 30 § 59, can serve only as long as his predecessor would have served had he not been suspended.

SEPTEMBER 29, 1965.

HIS EXCELLENCY, JOHN A. VOLPE, *Governor of the Commonwealth.*

DEAR GOVERNOR VOLPE:—I have received your letter of September 29, 1965, wherein you have requested my opinion with regard to G. L. c. 30, § 59, sometimes called the Perry Law. Your question relates to the term of office of temporary officers and employees appointed under the provisions of this section, and reads as follows:

“If an appointing authority has elected under G. L., Chapter 30, Section 59, to fill on a temporary basis the office or employment of one under suspension in accordance with said section 59, and the latter should resign from said office or employment during such suspension, is the appointing authority thereupon empowered to appoint another officer or employee to fill the unexpired term?”

General Laws, Chapter 30, section 59 authorizes the suspension of appointed officers and employees “during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him.” During the period of such suspension, the officer or employee in question receives no compensation; nor is the period counted in the computation of sick leave, vacation benefits or seniority rights. Should the officer or employee retire while under suspension, he would not be entitled to pension or retirement benefits, although any contributions he may have made to a retirement fund would be returned. If, however, criminal proceedings brought against the suspended officer or employee terminate without a finding or verdict of guilty, the suspension shall be removed, and the officer or employee is entitled not only to restoration to his position but also to receipt of all compensation and other rights and benefits which have been withheld.

The statute further provides:

“During the period of any such suspension, the appointing authority may fill the position of the suspended officer or employee on a temporary basis, and the temporary officer or employee shall have all the powers and duties of the officer or employee suspended.”

Thus, a decision by a given appointing authority to suspend an indicted officer or employee under the provisions of c. 30, § 59 does not mean that the position affected must remain vacant. It is within the discretion of the appointing authority to fill the position on a temporary basis, pending a final determination of the guilt or innocence of the accused; such temporary appointee is vested with the same authority and responsibilities as was the permanent appointee.

The temporary appointee is, in effect, a substitute for the officer or employee who has been suspended. As I indicated in my opinion rendered to you on March 1, 1965 on the subject of the Perry Law, it is

apparent that the provision authorizing appointment on a temporary basis was included in the statute in order to ensure—to the extent possible—that the agency affected would continue to operate without interruption.

“The primary purpose of the Perry Law is to suspend from office persons in whom the public has lost confidence by reason of their having been indicted. Such a suspension undoubtedly can have a disruptive effect upon the functioning of the agency or department involved—especially where a department head is concerned. Provision for appointment of a temporary officer or employee to fill the vacant position and to have all the powers and duties formerly exercised by the permanent employee clearly was included in order to render the indictment and consequent suspension as harmless as possible to the continued efficient working of the governmental agency.” [See also *Bessette v. Commissioner of Public Works*, 1965 Mass. Adv. Sh. 367, 370.]

Accordingly, the temporary appointee is clothed with all of the attributes of office that were accorded the permanent officer or employee whom he has replaced. He is given the same responsibilities, and is vested with the same authority with which to fulfill them. He is entitled to the salary and other emoluments which normally attach to the office or position. Unless the officer or employee under suspension is acquitted and is restored to the position, or unless such person's right to the office otherwise comes to an end, the temporary appointee may complete the term of his predecessor. He may not be removed except for cause. Thus, the General Court has authorized the appointment of a substitute officer or employee to perform the duties of the position affected so long as that position would otherwise remain vacant.

However, as a substitute for a suspended officer or employee, the temporary appointee cannot exercise more authority or enjoy greater benefits of office than did his predecessor. It is clearly not the purpose of that paragraph of c. 30, § 59 which authorizes temporary appointments to create a new office or position. Nothing in the Perry Law indicates that the substitute was intended to have a term of office or employment different from that of the officer or employee he has replaced. It would be wholly inconsistent with the nature and purpose of the temporary appointment provisions of said § 59 to construe those provisions in such a way that there results the creation of a temporary appointee who has rights which are greater than those enjoyed by the officer or employee who has been replaced.

Since an indicted officer or employee can only be suspended under the Perry Law and is not removed thereby, the position in question is still in theory filled, and a new permanent appointment cannot be made. Once the position can be filled on a permanent basis, the need for a temporary appointee ends. This may happen as a result of acquittal of the person under suspension; in such a case, the Perry Law specifically states that the permanent appointee is entitled to return to his position, and consequently the term of office of the temporary appointee comes to an end. It may likewise happen upon final removal of the permanent appointee from the position. Such final removal could result from expiration of that person's term of office; from his removal for cause

pursuant to c. 30, § 9, or in accordance with the statute under which he was appointed; from his death; or from his resigning his office. Upon one or another of these events, the appointing authority is entitled to fill the position. Once a new appointment is made, there is no further possibility of a vacancy and the need for a temporary appointee ceases.

The Perry Law specifically provides that a given position may be filled on a temporary basis “[d]uring the period of any such suspension.” A suspension automatically terminates upon the occurrence of an event which finally removes the suspended officer or employee from his position—*e.g.*, expiration of the term of office, removal for cause or resignation.

It is my opinion—based upon the language and purpose of the temporary appointment provisions of c. 30, § 59—that a temporary appointee can serve only as long as his predecessor would have served had he not been suspended. Once the term of the person under suspension is terminated by one of the above-noted events, the term of office of his substitute also expires. With the end of service of the original appointee, a vacancy occurs which—in cases in which appointments are made by the Governor—may immediately be filled.

“Any vacancy in any office, the original appointment to which is required by law to be made by the governor . . . and for which no other method of filling vacancies is expressly provided by law, shall be filled for the unexpired term in the manner provided for an original appointment. . . .” *Massachusetts General Laws, Chapter 30, section 10.*

The fact that a temporary appointee happens to occupy the position in question at the time the original appointee resigns or is otherwise removed does not affect the right of the Governor to exercise this authority to make a new appointment under c. 30, § 10. The submission of a resignation by the original appointee automatically terminates the term of office of the temporary officer or employee placed in the position pursuant to the Perry Law, and leaves a vacancy which may be filled by the appointing authority for the remainder of the unexpired term.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The Department of Public Works does not have statutory authority to take by eminent domain, strips of property adjacent to highways solely for the preservation of natural beauty. However, the General Court may constitutionally enact a statute authorizing the taking of strips of property adjacent to highways for the preservation of natural beauty since such takings would be for a public use or purpose.

OCTOBER 5, 1965.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works.*
Re: *Eminent Domain—Takings Adjacent to Highways to Preserve Natural Beauty.*

DEAR COMMISSIONER SARGENT:—You have asked for my opinion on whether the Department of Public Works has the statutory and constitu-

tional power to acquire by eminent domain land adjacent to highways for the purpose of preserving natural beauty and other aesthetic values in connection with the accelerated Federal Highway Program as set forth in United States Department of Commerce, Bureau of Public Roads, Policy and Procedure Memorandum 21-4.6, dated January 5, 1965.

Preliminary consideration of pertinent Federal law and procedures is necessary and appropriate.

Title 23 U.S. Code provides, *inter alia*, in § 319:

“The construction of highways by the States with funds apportioned in accordance with Section 104 of this title may include . . . the purchase of . . . adjacent strips of land of limited width and primary importance for the preservation of the natural beauty through which highways are constructed. . . .”

Article 5 of said USBPR Policy and Procedure Memorandum 21-4.6, entitled “ELIGIBLE PROJECTS”, provides, *inter alia*:

“b. . . . Adjacent strips may involve any of the following, or similar characteristics:

“(1) areas of woodland, wildwood, or groves of trees;

“(2) attractive water features such as streams and lake shores, rivers and shorelines;

“(3) mountains or similar vistas of obvious scenic quality;

“(4) scenic strips to protect a scenic view or scenic vistas, involving mountains, water, vegetation, or the like;

“(5) areas involving special topographic features such as rock outcrops, rock ledges, bluff faces, swamps, islands, or other unique formations;”

Although the language of Title 23 USC § 319 does not expressly authorize Federal participation in the cost of acquiring land by eminent domain for the preservation of natural beauty, it is my opinion that the word “purchase” as used in Section 319 includes acquisition by eminent domain. I adopt the following reasoning:

“When used in a statute, the word ‘purchase’ is frequently held to include any method of acquisition other than by descent. 7 *Words and Phrases*, 5853. To construe the word here to mean only acquisition by buying, we must assume that Congress had in mind the method of acquisition rather than the general purpose to acquire. The mere use of the word ‘purchase’ . . . is not to my mind a sufficient reason for such assumption. If, as we must, we give the members of Congress credit for a reasonable knowledge of human nature, they must be assumed to have known that to restrict acquirement to voluntary sales by the owners would most probably defeat the chief purpose for which the appropriation was made. . . . [T]he first section of [Title 40 U.S.C., § 257] makes further discussion unnecessary. The very purpose of that section was to authorize condemnation whenever, theretofore or thereafter, an act of Congress authorized land to be ‘procured’ for public use.” *United States*

v. *Beatty*, (D.C.W.D. Va., 1912) 198 F. 284, 286, 287, rev'd. on other grounds 203 F. 620, cert. den. 232 U.S. 463.

It is my opinion that the Department of Public Works does not have statutory authority to take by eminent domain strips of property adjacent to highways solely for the preservation of natural beauty. Section 7 of Chapter 81 of the General Laws provides *inter alia*:

"If it is necessary to acquire land for the purposes of a state highway . . . the department may take the same by eminent domain . . ."

The law governing whether acquisition of specific land is "necessary . . . for the purposes of a state highway" is well established.

"When private property is taken in the exercise of the right of eminent domain, the taking must be limited to the reasonable necessities of the case, so far as the owners of the property taken are concerned." *Rockport v. Webster*, 174 Mass. 385, 390. *Newton v. Newton*, 188 Mass. 226, 228.

A determination by the duly authorized taking agency that it is necessary to take certain property is conclusive. *Lynch v. Forbes*, 161 Mass. 302, 308-309.

"The necessity for appropriating property for public use is not a judicial or quasi-judicial question but is a legislative one." *Hayeck v. Metropolitan District Commission*, 335 Mass. 372, 375.

". . . the decision of [the] condemnor is final as long as it acts reasonably and in good faith. If the land is of some use to it in carrying out its public object, the degree of necessity is its own affair." 1 *Nichols on Eminent Domain* (3d Ed.), § 4.11[3], p. 570, 572.

Broad discretion is delegated to the Department of Public Works by G. L. § 7 of Chapter 81 provided land acquisition is for highway purposes. Takings of strips of land adjacent to highways primarily for the preservation of natural beauty is not authorized by G. L. § 7, Chapter 81. Acquisition must be for a primary purpose that relates directly to the laying out, construction, maintenance or operation of state highways. If the primary purpose of the legislation is a permissible public purpose, then aesthetic considerations are also permissible. *Welch v. Swasey*, 193 Mass. 364, 374-375, aff'd, 214 U.S. 91.

For example, takings of land by eminent domain for wide median strips to increase the safety of travel are considered "necessary . . . for the purposes of a state highway". The fact that such strips may also preserve natural beauty is incidental and not germane to the validity of their acquisition.

However, it is my opinion that it is not "necessary . . . for the purposes of a state highway" (G. L. § 7, Chapter 81) to take strips of land adjacent to highways solely for the preservation of natural beauty of areas through which highways may pass.

Interpretation of the meaning of the language of G. L. § 7, Chapter 81 requires consideration of § 13A of said Chapter 81, which provides, *inter alia*:

"The department may accept in behalf of the commonwealth from owners of lands included in a strip one hundred feet deep bordering on a state highway voluntary gifts . . . of easements in such lands, giving the commonwealth the right to enter thereon . . . for the purpose of landscaping such land. . . . The department may improve lands in which such easements are granted, so as to carry out a comprehensive plan of highway beautification, artistic landscaping and scenic development, to the extent that appropriations are available therefor.

"Such easements shall be accepted only on the condition that such land shall remain fully subject to local taxation to the owners of the fee."

Said section 13A explicitly authorizes a "comprehensive plan of highway beautification . . . and scenic development" of strips of land bordering state highways. However, it authorizes only the acceptance of gifts of easements for this purpose. It does not expressly authorize takings by eminent domain. The legal maxim *expressio unius est exclusio alterius* must apply. The express mention of one thing implies the exclusion of another. If the Legislature intended takings by eminent domain to accomplish the "comprehensive plan of highway beautification," it must explicitly delegate that power for that purpose. The concern for frugality evident throughout section 13A clearly indicates that the power to take by eminent domain was intentionally omitted therefrom.

The rules governing statutory construction further support the above interpretation of sections 7 and 13A. Those sections must be read together so as to make Chapter 81 a consistent and harmonious whole. See *Real Properties, Inc. v. Board of Appeals of Boston*, 311 Mass. 430. Section 7, most recently amended in 1931, relates generally to the acquisition of interests in land for the purposes of state highways. Section 13A, enacted in 1936, relates particularly to acquisition of interests in land to accomplish a comprehensive plan of highway landscaping and beautification. It is a canon of statutory construction that a particular provision prevails over a general provision. That rule applies to Chapter 81 with greater force because section 13A, the particular provision, is later in time of enactment. It should also be noted that statutory provisions such as section 7, delegating the power of eminent domain, must be construed with considerable strictness. *Holliston v. Holliston Water Co.*, 306 Mass. 17, 19.

The second part of your question is concerned with the existence of constitutional authority for takings by eminent domain of strips of land bordering state highways for the preservation of natural beauty.

It is my opinion that the General Court may constitutionally enact a statute authorizing the taking of strips of property adjacent to highways for the preservation of natural beauty.

The constitutions of both the United States of America and the Commonwealth restrict the taking of private property by eminent domain by the Commonwealth to public uses or purposes. U.S. Constitution, Amendment 14; Commonwealth of Massachusetts Constitution, Article 10. *Wright v. Walcott*, 238 Mass. 432, 434-435.

It is my opinion that the taking of strips of property on each side of

highways to be used not for travel, but for the preservation of natural beauty would constitute takings for a valid public use or purpose, conserving and developing the natural resources of the Commonwealth.

Article 49 of the Amendments of the Constitution of Massachusetts provides:

"The conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the commonwealth are public uses, and the general court shall have power to provide for the taking, upon payment of just compensation therefor, of lands and easements or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof and to enact legislation necessary or expedient therefor."

The taking contemplated by the USBPR Policy and Procedure Memorandum 21-4.6 of January 5, 1965 of "areas of woodland, wild-wood, or groves of trees," "attractive water features such as streams and lake shores, rivers and shorelines," "rock outcrops, rock ledges," etc. for the "preservation of . . . natural beauty," would promote the "conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the Commonwealth." Such takings would be for "public uses" within Article 49 of the Constitution of the Commonwealth.

It is also my opinion that such takings would be for a public use or purpose within the meaning of the Constitution of the United States. The Supreme Judicial Court has stated:

"The people of this Commonwealth have declared by the Forty-ninth Amendment that the development of water power such as is authorized by the bill is a public use. The tendency of recent decisions of the Supreme Court of the United States has been to accept as true in its application to local conditions a constitutional declaration of a State to the effect that a given expropriation of private property is to a public use. [citing cases]." *Opinion of the Justices*, 237 Mass. 598, 612.

Takings by eminent domain for the preservation of natural beauty would be devoid of even a hint of private use, benefit, or gain. No transfer of such taken property to or for any private person or interest is contemplated. Title to the property would remain in the Department of Public Works. Its benefit and enjoyment would be open to the public on equal terms. See *Machado v. Board of Public Works of Arlington*, 321 Mass. 101, 103-104.

Consideration must be given to one other constitutional provision, Article 10 of the Constitution of Massachusetts provides, *inter alia*:

"The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or

street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions."

That paragraph was added to Article 10 by Article 39 of the Amendments to the Constitution. It appears to impose restrictions on the amount of land that the Legislature may constitutionally enable the Department of Public Works to take. However, it has been strictly construed. The Supreme Judicial Court has stated that Article 39 was designed to enlarge, not restrict, the powers of the Legislature to delegate the power of eminent domain. Its purpose was to authorize takings for transfer to private individuals for commercial development of the locality. *Opinion of the Justices*, 330 Mass. 713, 720-723. Takings for highway beautification do not in any way involve transfer to private individuals. Article 10 as amended, was not intended to prevent the enactment of a statute under the authority of Article 49 of the Amendments to the Constitution of the Commonwealth because of some relationship to the Massachusetts highway system.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The procedures used by the Department of Public Works in connection with Layout Number 5395 of May 5, 1964, conformed with requirements set forth by the Attorney General.

A property owner, by law, can accept the award of damages voted by the Department of Public Works. On the other hand, he is not compelled to accept an offer, but may petition for assessment of damages by the Superior Court under the provisions of Chapter 79 of the General Laws.

OCTOBER 6, 1965.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works*.

Re: L.O. 5395 (I-91, Holyoke 5/5/64) *Propriety of Taking Procedures*.

DEAR COMMISSIONER SARGENT:—You have asked my opinion on the propriety of the method of making awards for damages arising from the takings of property by eminent domain for Layout No. 5395 (Interstate Route 91) in Holyoke, Massachusetts, on May 5, 1964. You have advised that the Commissioners of the Department of Public Works voted some awards initially on the basis of the assessed valuation of the property taken, reserving the right to make subsequent adjustments. Some awards were increased after completion of further appraisals.

Specifically you have asked:

1. "Whether or not the procedures used by the Department of Public Works in this instance, conform to the requirements set forth in the Attorney General's letter of December 27, 1963 to former Commissioner Jack P. Ricciardi?"

2. "Can the property owner, by law, accept the voted award?"

The letter of the Attorney General of December 27, 1963 to former Commissioner Jack P. Ricciardi emphasized the protection of the rights of citizens whose property is taken by eminent domain by, *inter alia*, damage awards in fair and reasonable amounts being adopted by the taking authority at the time orders of taking are voted.

Prior to the adoption of the captioned order of taking the Department of Public Works made title searches and appraisals of damages. The awards of damages were voted by the Commissioners at the time of the adoption of the captioned order of taking. Notices of takings were sent promptly to all owners and mortgagees of record. Prompt payments were made in accordance with the provisions of the Constitution of the Commonwealth. The procedures utilized by the Department of Public Works in connection with the captioned taking were an improvement in condemnation practices, as required by the December 27, 1963 Opinion of the Attorney General.

In connection with the initial reliance of the Commissioners on assessed value as a basis for a realistic award of damages note must be taken of Part II, c. 1, § 1, article 4 of the Constitution of the Commonwealth, empowering the imposition of "proportional" tax assessments. The provisions of §§ 38, 43, 45 and 52 of Chapter 59 of the General Laws require assessors to make fair cash valuations of all real estate and to sign under penalties of perjury a statement at the end of a list thereof that they have so acted. Each assessor takes an oath *inter alia* ". . . neither to overvalue nor undervalue any property subject to taxation." § 29, Chapter 41 of General Laws. *cf. Bettigole et al v. Assessors of Springfield et al*, 343 Mass. 223 at pp. 230-232.

It is my opinion that the procedures used by the Department of Public Works in connection with Layout No. 5395 of May 5, 1964 conformed with the requirements set forth in the December 27, 1963 Opinion of the Attorney General to then Commissioner Ricciardi. In connection herewith your attention is invited to the duty of the Commissioners to amend an award of damages if new facts or expert advice indicate that a change in their previous opinion is required in the interests of equity and justice. Effective November 1, 1964 the Legislature established by § 3 of Chapter 579 of the Acts of 1964 a more exact definition and practical application of the "accepted appraisal principles" than was extant under the law when my opinion of December 27, 1963 was rendered. Chapter 79 of the General Laws has required since November 1, 1964 in Section 7A:

"An award of damages made pursuant to section six or section seven shall not be made until at least one appraisal has been made in accordance with section twelve on behalf of the taking authority and filed therewith."

In reply to your second question it is my opinion that the property owner, by law, can accept the voted award. The landowner has the constitutional right to accept any offer made by the State as compensation for damages. Owners are not compelled to accept an offer. They may petition for assessment of damages by the Superior Court under the

provisions of Chapter 79 of the General Laws. To accept or reject such an offer is solely within the discretion of the former owner of property taken by eminent domain.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Registry may properly charge a fee for each written reply to a request for limited summary information, provided that, in addition, the public records of the Registry continue to be "open to the inspection of any person during reasonable business hours."

OCTOBER 7, 1965.

HON. RICHARD E. McLAUGHLIN, *Registrar of Motor Vehicles*.

DEAR SIR:—I am in receipt of your request for my opinion whether upon discontinuance of the present free telephone listing service, the Registry of Motor Vehicles may charge fifty cents for providing a written reply to each request for information from the public. This written reply would contain limited summary information from the records of the Registry. You ask further whether the sending of written summary information at a fifty cent charge would be prohibited by c. 90, § 33, which sets the fee "for every copy of any record, or any certificate . . ." at one dollar and fifty cents.

It is my opinion that a fifty cent charge for limited summary information sent out from the Registry would be proper. The sending of the name and address of the owner of an automobile and the name of his insurance company to a requesting party would not constitute the making of a copy of a record or certificate; rather, this service would involve an analysis of the records, the extraction from the records of limited information by employees of the agency, and the clerical task of processing and mailing the information.

Although there is no further statutory duty imposed upon the Registrar in his position as a custodian of public records than to provide that "such records . . . be open to the inspection of any person during reasonable business hours" [c. 90, § 30], as a state agency, the Registry has, beyond its express grant of powers and duties, such powers as are reasonably necessary for carrying out its responsibilities (*Scannell v. State Ballot Law Commission*, 324 Mass. 494). Certainly, the authority for instituting the proposed service at a reasonable cost for each request can be found within the normal scope of this implied power.

Therefore, it is my opinion that the Registry may properly charge fifty cents for each written reply to a request for limited summary information (upon discontinuance of the free telephone listing service) provided that, in addition, the public records of the Registry continue to be "open to the inspection of any person during reasonable business hours."

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Government Center Commission is specifically precluded from making any binding commitment for the expenditure of funds beyond its appropriation, and cannot make commitments which would render it unable to complete an adequate program within its present resources.

OCTOBER 7, 1965.

HON. JEREMIAH SUNDELL, *Chairman, Government Center Commission.*

DEAR SIR:—I am in receipt of your request for my opinion concerning the courses of action open to the Government Center Commission in view of its desire to spend an estimated \$7,750,000 more than the \$34,000,000 already appropriated for authorized building projects.

You state that you expect the additional sum to be appropriated in future, and you ask whether the Commission may, before then, advertise for bids at one contract price for the construction of the three buildings which the Commission is required to construct even though the construction estimates exceed the appropriation.

You also ask whether in the alternative the Commission may advertise for bids for the construction of as many buildings as its present construction estimates indicate appropriated sums available and award such contracts based on bids within the appropriation.

In answer to your first question, I call your attention to the following sections of c. 29 of the General Laws:

Section 26:

“Expenses of offices and departments for compensation of officers, members and employees and for other purposes shall not exceed the appropriations made therefor by the general court or the allotments made therefor by the governor. No obligation incurred by any officer or servant of the commonwealth for any purpose in excess of the appropriation or allotment for such purpose for the office, department or institution which he represents, shall impose any liability upon the commonwealth.”

Section 27 provides in part as follows:

“Notwithstanding any provision of general law, no department, office, commission and institution shall incur an expense, increase a salary, or employ a new clerk, assistant or other subordinate, unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made. . . .”

The above-referred to § 26 directly prohibits the Government Center Commission from making any binding commitment for the expenditure of funds beyond its appropriation.

In answer to your second question, an examination of the statute which established the Government Center Commission (St. 1960, c. 635) and of the principal amendment thereto (St. 1962, c. 685) indicates that the Legislature intended the mental health building, the employment security building, and the health, education and welfare building all to be constructed with the single appropriation of \$34,000,000. The Government Center Commission cannot, therefore, expend so much of the

appropriation on one or two buildings in a manner to prohibit completion of all three buildings within the present appropriation. If it so wishes, and if it is able to do so, the Commission can enter into contracts for a portion of the project, provided that it retains sufficient funds to complete the minimum requirements for the remainder without exceeding the total of \$34,000,000. If the General Court does not later appropriate the additional \$7,750,000, the Commission would still have to fulfill its obligations, although to do so it would have to construct a portion of the project on a much more modest, though adequate, scale.

The clear intent of the enabling statutes was to require all three buildings to be constructed from the original \$34,000,000. Therefore, the Commission cannot make commitments which would render it unable to complete an adequate program within its present resources.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

St. 1965 c. 253 is an unconstitutional exercise of legislative authority; since it deprives the Boston and Maine Railroad of rights which are generally available to railroad companies.

OCTOBER 7, 1965.

HON. ROY C. PAPALIA, *Chairman, Department of Public Utilities*.

DEAR MR. PAPALIA:—You have submitted a request for an opinion with regard to the interpretation and validity of c. 253 of the Acts of 1965, which chapter relates to the reconstruction and repair of the Hale Street Bridge in the City of Lowell. This statute contains a specific directive by the General Court to the Department of Public Utilities which provides as follows:

“The department of public utilities is hereby directed to order the Boston and Maine Railroad to reconstruct or repair the overhead bridge located on Hale Street in the city of Lowell.”

You have asked whether your Department is legally authorized to issue the order in question, and—if such authority does exist—whether the order must be preceded by an investigation or by hearings.

The subject of reconstruction and repair of railroad bridges is governed by the provisions of c. 159 of the General Laws. Alterations in bridges, or complete reconstruction thereof, are covered by G. L. c. 159, § 59, which provides in part as follows:

“If a public way and a railroad cross each other, and the board of aldermen of the city or the selectmen of the town where the crossing is situated, or the department of public works, if the crossing and its approaches are in direct continuation of a state highway, or the directors of the railroad corporation, or the directors of a railway company having tracks on said way, deem it necessary for the security or convenience of the public that an alteration not involving the abolition of a crossing at grade should be made in the crossing, the approaches thereto, the location of the railroad or way, or in a bridge at the crossing, they shall

apply to the board of county commissioners, or, if the crossing is situated in whole or in part, in Boston, to the department of public utilities, which shall after public notice, hear all parties interested, and, if it decides that such alteration is necessary, shall prescribe the manner and limits within which it shall be made, and shall forthwith certify its decision to the parties and to said department of public utilities. . . .” [Emphasis supplied.]

Thus, if actual reconstruction of the bridge in question is sought, regular statutory procedures are available by which to accomplish the desired result. Application may be made by any of the parties referred to in the section quoted above to the appropriate County Commissioners [or—for crossings situated within the City of Boston—directly to the Department of Public Utilities]; after public notice and a hearing, the County Commissioners must decide whether the bridge requires alteration or reconstruction, and must indicate what changes are to be made and when they are to be completed. A party aggrieved by a decision of the County Commissioners rendered under this section may appeal to the Department of Public Utilities [G. L. c. 160, §§ 111-113]. Matters of law which have arisen before the Department in such a case may be reviewed by the Supreme Judicial Court [G. L. c. 25, § 5].

It should be noted, however, that St. 1965, c. 253 would permit the Department of Public Utilities simply to order *repair* of the Hale Street Bridge, rather than requiring total *reconstruction*. It is clear that the Legislature has treated the need for maintenance or repair differently from the need for reconstruction or significant alteration. *Boston and Albany Railroad Company v. Department of Public Utilities*, 314 Mass. 634, 636-638.

The ordinary procedure for determining that reconstruction is necessary is that provided by G. L. c. 159, § 59, described above. Maintenance or repair, on the other hand, may be ordered pursuant to G. L. c. 159, § 84.

“If the county commissioners of a county, the board of aldermen of a city or the selectmen of a town *where a bridge at the crossing of a public way and a railroad*, or a bridge upon which a railway company is authorized to lay and use tracks, is located in whole or in part, or the directors of a corporation owning or operating such railroad, or the directors of a company owning or operating such railway, are of the opinion that such bridge is in need of maintenance or repair, they may apply to the department [of public utilities], which shall, after public notice, hear all persons interested, and, if it decides that the work of maintenance or repair is necessary, shall prescribe the manner in and the limits within which it shall be done, and shall forthwith certify its decision to the parties.”

Accordingly, in cases in which maintenance or repair is sought, application is made directly to the Department of Public Utilities rather than to the County Commissioners. Matters of law which come before the Department during such a proceeding may likewise be reviewed by the Supreme Judicial Court pursuant to G. L. c. 25 § 5.

It is apparent that the General Court has left to the Department of Public Utilities the authority to determine either that the Boston and Maine Railroad is to be required to reconstruct the bridge in question altogether or—in the alternative—that the railroad is to be permitted simply to repair the structure. Thus, as set forth above, the Department may, pursuant to St. 1965, c. 253, choose to enter an order which requires following the procedures provided by c. 159, § 59; or the Department may, if it prefers, accomplish a result which—absent the authorization contained in St. 1965, c. 253—could only have been reached in accordance with c. 159, § 84. In neither case would there be compliance with the applicable provisions of the General Laws.

In light of the fact that the Legislature has singled out the Hale Street Bridge and the Boston and Maine Railroad for special summary treatment, thereby ignoring the general reconstruction and repair provisions which are available to and which protect all other railroad corporations in similar circumstances, I can only conclude that St. 1965, c. 253 is an unconstitutional exercise of legislative authority. The General Court has—by its directive to the Department of Public Utilities—deprived the Boston and Maine Railroad of rights which are generally available to railroad companies. Prior to the entry of an order directing the reconstruction or repair of a railroad bridge, the company in question is ordinarily entitled to public notice that such reconstruction or repair is sought, and to the holding of a public hearing at which County Commissioners or the Department of Public Utilities may take testimony with regard to the petition. The company is justified in expecting that orders for reconstruction or repair will be based upon proper findings of fact, and is entitled to judicial review in the event that errors of law have been committed by the hearing agency.

These general statutory provisions have been suspended with respect to the Hale Street Bridge situation. There has been no public notice relative to the bridge in the sense contemplated by c. 159, and public hearings have not been held by the regularly constituted bodies vested with such responsibility. In addition, both §§ 59 and 84 of c. 159 enumerate specific groups or bodies which shall have standing to bring the petitions authorized by those sections; but St. 1965, c. 253 dispenses with the requirement that proceedings of this nature be instituted by the persons specifically named in c. 159.

It is manifest that St. 1965, c. 253 deprives the Boston and Maine Railroad of rights and the protection guaranteed by the General Laws to all railroads operating in the Commonwealth. As such, the act in my opinion, violates that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” In addition, it is my opinion that St. 1965, c. 253 deprives the Boston and Maine Railroad of property in contravention of the Fourteenth Amendment, and in violation of Articles X and XII of the Declaration of Rights of the Commonwealth of Massachusetts.

The right of the General Court to subject railroads to reasonable regulation cannot be contested. But each railroad must be regulated in ways which are similar to all other railroads in the same class and

circumstances. “. . . That the [railroad] is guaranteed ‘equal protection of equal laws without discrimination or favor based upon unreasonable distinctions’ under the Constitutions of both the Commonwealth and the United States is not to be doubted. . . .” *McQuade v. New York Central Railroad Company*, 320 Mass. 35, 38.

The Legislature cannot provide a specific procedure to be followed with regard to petitions for reconstruction or repair of railroad bridges, and then suspend that procedure in one given case. Nor can the Legislature accomplish what is in effect a deprivation of the railroad’s property without compliance with the principles of due process—safeguarded in this instance by the procedures contained in G. L. c. 159, §§ 59 and 84.

The special act cannot be reconciled with the general provisions of c. 159. Even were the Department of Public Utilities to follow the procedures of c. 159 on the theory that the General Court intended to include them by implication, the provisions of c. 159 would still have been suspended to a certain extent—*i.e.*, that the proceeding had not been initiated by one of the specifically enumerated parties. I am aware that every rational presumption must be indulged in in favor of the validity of an act of the Legislature. *Commonwealth v. S. S. Kresge Company*, 267 Mass. 145, 148.

But I am convinced that the General Court did not intend that this special act be reconciled with the provisions of c. 159. Had this been its intention, it is unlikely that such a conclusion would have been left to inference.

Accordingly, it is my opinion that St. 1965, c. 253 is an unconstitutional enactment of the General Court.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The term “negro” sufficiently meets the requirements of G. L. c. 46 § 1. Under this statute the Secretary of State and town clerks must accept any reasonable response to the inquiry “color” which is not inaccurate and unresponsive.

OCTOBER 14, 1965.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR MR. SECRETARY:—I am in receipt of your request for my opinion concerning the meaning of the word “color” as it is used in the statutes governing vital statistics, in particular, §§ 1, 3, 16 and 17 of c. 46 of the General Laws. Your request is in three parts; I shall deal with each in turn.

“1. May the word ‘negro’ be used to meet the legal requirements of G. L. c. 46, § 1?”

There are no authoritative Massachusetts cases interpreting the word “color” within the meaning of G. L. c. 46, § 1. However, the word “color,” when used in legislation, has often been considered interchange-

able with the word "race," and is often so used in common usage. See *Gong Lum v. Rice*, 275 U.S. 78 (1927), *United States v. LaCoste*, 26 Fed. Cas. 826 (D. Mass. 1820), and *Rose v. Deasy*, 2 Race Rel. L. Rep. 667 (Mass. Superior Ct., Eq. No. 71770 [1957]). Because of this, and because of considerations expressed more fully below, it is my opinion that the term "negro" sufficiently meets the requirement of the statute, and should be accepted where offered in response to the inquiry concerning color.

"2. Should 'color' be interpreted as synonymous with 'race' and thereby restricted to those five colors which are traditionally used to describe those races?"

As indicated above, "color" has often been used to denote "race." It does not follow, however, that the only correct response to the inquiry "color" is white, black, brown, red or yellow (on the theory, as you express it, that these are "the five colors which are traditionally used to describe these races"). The use of these five colors is but one of a number of possible racial classifications. It would be extreme to assert that by use of the word "color," the Legislature meant to *impose* upon Massachusetts residents, without exception, a single, arbitrary, scientifically questionable and, to some people, offensive system of racial classification. The case which you describe in your letter illustrates the incongruity of the five-color classification. In that case, if this system is followed, the negro woman in your example, whom you describe as "of light skin," would be required, against her will, to be classified as "black." In my opinion, under G. L. c. 46, the Secretary of State and town clerks must accept any reasonable response to the inquiry "color" which is not inaccurate and unresponsive. I would consider as acceptable such commonly recognized designations of race as caucasian or negro, or, alternatively, of skin color as brown, black or white.

"3. Is 'color' to be taken literally, *i.e.*, as referring to pigmentation of the skin and therefore allowed as an entry such words as best describe the individual's skin color (*i.e.* light brown, etc.)?"

"Color" has been construed as equivalent to race. This construction, however, was rendered in cases in jurisdictions or at times which scarcely render them of decisive weight in this Commonwealth today. Concepts of race and skin color are closely intermingled, and it is difficult to say that the word "color," alone, calls for one but utterly excludes the other. The fact is, the word "color," like the word "race" itself, lacks precise, scientific meaning. To some it may suggest race; to others it may suggest skin color; to others it may suggest a blending of both.

In my view, reasonable racial designations and reasonable designations of skin color both comply with the statute and must be accepted.

Accordingly, I am of the opinion that a substantially accurate designation of skin color such as "light brown" could comply with the statute. Scientific and practical considerations, however, might limit the use of classifications based exclusively on skin color. For example, it might be difficult to know how to classify a "white" person of florid complexion. In any event, a person who wished to be classified by race (*i.e.* negro or caucasian) might legitimately object to being classified by skin color over his objections.

I recognize that the above interpretation may lead to difficulty in keeping systematic records, especially where automatic tabulation may be involved.

However, G. L. c. 46 does not, in my view, give to any town clerk or state official the power to reject reasonable and truthful answers relating to "color" which provide responsive data either as to skin color, race or both. In the case of a person's color, unlike his skin or weight, a subjective element is involved, as there are differing views today, even among scientists, as to appropriate definitions and terminology. Accordingly, to the extent there is *legitimate* disagreement as to terminology and classification, the individual's own view as to his "color" should prevail. Otherwise, the individual could be described in a vital record such as a marriage certificate in a manner which is deeply offensive to him and yet is no more demonstrably accurate or correct than would have been the case had the individual's preferred description prevailed.

Any interest the state may have in systematic record keeping cannot be at the expense of an individual's right to be described in vital public records in a manner which is fair and reasonable, especially where a designation as important as the one in question is involved. There is nothing in G. L. c. 46, §§ 16 or 17, which gives the Secretary of the Commonwealth the authority to narrow and delimit the available responses to the term "color" over the objection of the individual within the statutory limits above set forth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Director of Building Construction has the authority to supervise the spending of \$306,000 appropriated by c. 648 of the Acts of 1963 for the reconstruction and improvement of the Mount Greylock War Memorial.

OCTOBER 14, 1965.

HON. J. NORMAN O'CONNOR, *Chairman, Mount Greylock State Reservation Commission*.

DEAR SIR:—I am in receipt of your request of September 14, 1965 for my opinion regarding the question you have as to the authority of the Director of Building Construction to supervise the spending of \$306,000 appropriated by c. 648 of the Acts of 1963 for the reconstruction and improvement of the Mount Greylock War Memorial.

You have stated that the Commissioner of Administration and Finance has given control of the reconstruction project to the Director of Building Construction and, further, that the Commissioner has appointed an architect for the project.

As a general matter, the Legislature has placed with the Director of Building Construction the authority to supervise and control construction, reconstruction and repair projects which are financed by appropriations of public monies.

"Except as otherwise provided in this section or by any appropriation

act of the general court, the director of building construction shall, in the manner and to the extent provided by this chapter, have control and supervision of all building construction projects, as hereinafter defined, which may be undertaken by the commonwealth. . . ." *G. L. c. 7, § 30A.*

The remainder of § 30A defines various types of projects which are subject to the control of the Director of Building Construction. Such projects include those which are financed in whole or in part by appropriation; those which the estimated cost of the work exceeds ten thousand dollars, and those which involve repairs costing more than ten thousand dollars, such repairs being of greater magnitude than ordinary repairs or maintenance work.

The work to be done at the Mount Greylock War Memorial is beyond the scope of ordinary repair work and it is financed by an appropriation of more than ten thousand dollars. Consequently, this work is a project for which our General Laws provide control and supervision by the Director of Building Construction. That control is not, however, absolute.

The Commissioner of Administration and Finance may place supervisory control over the project with the agency for which the project is to be undertaken and, in so far as the Commissioner could do so, he could remove control from the Director. This, however, is a discretionary determination on the Commissioner's part.

"The commissioner *may* . . . direct that any such project shall be undertaken by the operating agency free from the control and supervision of the said director." [Emphasis supplied.] *G. L. c. 7, § 30A.*

By declining to exercise this discretion, the Commissioner has left the Director of Building Construction with a statutory responsibility to supervise and control the projected work on the Mount Greylock War Memorial. Such supervisory control does not, however, include the authority to designate the architect for the project.

It is the Commissioner's responsibility to designate an architect or an engineer for the project. The agency for which the project is undertaken may recommend an architect to the Commissioner who then must consider such a recommendation, but it is the Commissioner's sole responsibility to make the appointment. [*G. L. c. 7, § 30B.*]

Accordingly, it is my opinion that the Director of Building Construction has the authority to supervise the spending of \$306,000 appropriated by c. 648 of the Acts of 1963 for the reconstruction and improvement of the Mount Greylock War Memorial.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The State Racing Commission may not lawfully issue a license for harness racing which is to be conducted at times other than those specified in c. 128A, § 3(b).

OCTOBER 19, 1965.

HON. PAUL F. WALSH, *Chairman, State Racing Commission.*

DEAR MR. WALSH:—I have received your letter of October 14, 1965, wherein you request my opinion with regard to an application for permission to hold "double-header racing cards" on certain specified Saturdays filed with your Commission by the Eastern Racing Association, Inc. You have provided me with the following pertinent facts in connection with the request. Early in January, 1965, applications for licenses to conduct harness horse racing meetings were filed by the Eastern Racing Association and by the Bay State Harness Horse Racing and Breeding Association, Inc. In its application, Eastern sought issuance of a license for thirty-six (36) week days of racing to be held at Suffolk Downs in East Boston between October 18 and November 27, 1965, with racing to be conducted between the hours of 7:00 p.m. and midnight. Bay State, on the other hand, applied for a license for ninety (90) dates to be held at the Bay State Raceway in Foxboro between June 21 and October 2, 1965, the races in question to be run between 7:00 p.m. and midnight as at Suffolk Downs.

Public hearings were held by the State Racing Commission upon each application as required by G. L. c. 128A. On January 28, 1965, the Commission voted to grant thirty (30) racing dates to Eastern between October 25 and November 27, 1965, for racing between 7:00 p.m. and midnight. At the same time, it was voted to grant to Bay State sixty (60) racing dates between June 21 and August 28, 1965, for racing between 7:00 p.m. and midnight. Thus the Commission allotted the full ninety (90) days permitted by G. L. c. 128A, § 3(j) for harness horse racing meetings conducted within the Commonwealth at places other than state or county fairs. Bay State has now concluded its licensed racing meeting, while Eastern's licensed meeting is scheduled to begin on October 25, 1965.

On October 11, 1965, your Commission received a letter from the Eastern Racing Association, a copy of which is attached to your request, in which Eastern requested permission to conduct the following:

"Double-header racing cards to be run on Saturdays of our coming harness racing meeting; namely, October 30th, November 6th, 13th, 20th and 27th, to consist of eight races in the afternoon and nine races in the evening, with one admission charge for both. Post time for the afternoon races is contemplated at 3:00 p.m.; and for the evening races, the usual time of 7:45 p.m.

The Commission must act shortly upon the request of the Eastern Racing Association, and accordingly you have posed the following four questions:

"(a). In the matter of the request of the Eastern Racing Association, Inc. for permission to conduct harness horse racing on certain Saturdays during the 1965 harness horse racing meeting between the hours of 3:00

P.M. and 12:00 Midnight—and in view of the provisions of Chapter 128A of the General Laws, Section 3, paragraph (b) and (j) can the Commission consider granting permission for a harness horse racing program which starts at approximately 3:00 P.M. and runs to approximately 12:00 Midnight as one day of racing?

“(b). If the answer to (a) above is in the affirmative can the Commission allow the extra races requested in the communication dated October 11th, 1965 on the application dated January 4th, 1965?

“(c). If the answer to (a) above is in the affirmative and the answer to (b) above is in the negative can the Commission accept a new application from the Eastern Racing Association, Inc. amending the application dated January 4th, 1965 so as to include racing earlier than 7:00 P.M. on certain Saturdays during the 1965 harness racing meeting?

“(d). If the answer to (c) above is in the affirmative is the Commission required to hold public hearings in accordance with the provisions of Chapter 128A of the General Laws, Section 3, if an amended application is filed?”

Your request in essence calls for a determination as to whether the licensing provisions established by the General Court authorize the plan for double-header racing cards which has been proposed.

The racing of horses and dogs in the Commonwealth has been carefully regulated by the Legislature. General Laws c. 128A, E 2 requires that persons desiring to conduct racing meetings apply to the State Racing Commission for licenses, and E 3 provides for the giving of notice and for the holding of public hearings upon such applications. Section 3 also contains a variety of conditions which must be met before a license may lawfully be issued. The Commission must be satisfied that the racing meeting in question will be conducted in an appropriate place, and at a permissible time of the year. The aggregate number of dates granted by the Commission for each form of racing may not exceed the number specified in paragraphs (f), (g) and (j) of the section. Provisions are likewise included for the regulation of racing at state and county fairs.

Section 3 further expressly provides that racing meetings must be restricted to specific times of the day or evening. Dog races may be held only between the hours of 7:00 p.m. and midnight, except in cases of national emergency. [E 3(e).] Equivalent provisions applicable to running and to harness horses appear in paragraph (b) :

“Such a meeting as may be for running horses shall be between the hours of ten o’clock ante meridian and seven o’clock post meridian only, and *such a meeting as may be for harness horses may be between twelve o’clock noon and seven o’clock post meridian or between seven o’clock post meridian and twelve o’clock midnight.*” [Emphasis supplied.]

It is clear that the Commission may not lawfully issue a license for harness horse racing which is to be conducted at times other than those specified in c. 128A, E 3(b).

Considering the language used by the Legislature in E 3(b), I must conclude that harness races may be run between noon and 7:00 p.m. or

between 7:00 p.m. and midnight on a given day, *but not both*. The references to the two times of the day appear in the alternative, with the disjunctive *or* as the connecting word. It must be presumed that the General Court used this language intentionally in order to establish that harness races were not to be run in both the afternoon and the evening on the same day at one given location. The Supreme Judicial Court has assumed that the Commission could not license both sets of times.

"By St. 1946, c. 575, §§ 1, 2 (see for recent amendments St. 1958, c. 229, E § 1, 2), harness racing hours were altered so as to permit such racing *either* between noon and 7 p.m. *or* between 7 p.m. and midnight." [Emphasis supplied.] *Bay State Harness Horse Racing and Breeding Association, Inc. v. State Racing Commission*, 340 Mass. 776, 779.

Had the Legislature wished to provide otherwise, it would not have used language which so clearly indicates that use of one set of specified times precludes use of the other set as well.

Likewise, E 3(b) cannot be interpreted as simply providing that harness racing shall not be conducted before noon or after midnight. Had this been the Legislature's sole intention, it is unlikely that the phrase "between twelve o'clock noon and seven o'clock post meridian or between seven o'clock post meridian and twelve o'clock midnight" would have been inserted into the paragraph. Use of this particular construction can only mean that the General Court intended to limit harness racing to the afternoon or to the evening on a given day, and was not concerned solely with the conducting of racing in the morning or after midnight.

The request of the Eastern Racing Association for permission to hold harness races from 3:00 p.m. to midnight is in effect an application for a license for racing in both the noon to 7:00 p.m. and the 7:00 p.m. to midnight time periods. Issuance of such a license would be a clear violation of the provisions of c. 128A, E 3(b). Likewise, since one of these time periods represents a "racing day" under c. 128A, and since the Commission has already allotted ninety (90) days for harness horse racing in the Commonwealth, the granting of Eastern's request would constitute the assignment of additional racing dates in violation of c. 128A, § 3(j) ("No licenses shall be issued for more than an aggregate of ninety racing days in any one year at the harness horse racing meetings combined, not including harness horse racing meetings at state or county fairs. . . .")

The plan proposed by the Eastern Racing Association clearly exceeds the limitations which have been placed by the Legislature upon harness horse racing conducted within the Commonwealth. Accordingly, the answer to your first question is in the negative. In light of this response with regard to the plan itself, it is unnecessary to answer your remaining inquiries.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Under the provisions of c. 54, § 23, M.G.L., and subject to the approval of the Executive Council, the Governor is obliged to make appointment of supervisors of an election when proper petition is made.

OCTOBER 21, 1965.

HON. JOHN A. VOLPE, *Governor of the Commonwealth.*

DEAR GOVERNOR VOLPE:—I have your letter of October 18, 1965, wherein you request my opinion upon the validity of a petition for the appointment of supervisors for the forthcoming election in the City of Somerville. The petition in question refers to the provisions of § 23 of c. 54 of the General Laws, and was filed in the office of the Governor on Monday, October 11, 1965.

The petition alleges that certain irregularities occurred during the preliminary election held in Somerville on October 5, 1965. Included are charges that the Somerville Election Commission violated G. L. c. 54, § 105 by permitting precinct workers to count ballots silently; that totals which had been compiled changed throughout the evening; and that many unsealed ballot envelopes were taken from polling places to the Somerville City Hall. The petition continues that the incumbent Mayor, Lawrence F. Bretta, appeared and solicited votes at polling places throughout the City, and that certain City employees worked at the polls on behalf of the Mayor. It is further charged that an employee of the Somerville Department of Public Welfare solicited votes for the Mayor from financial aid recipients; that the Election Commissioner hired employees of the office of the City Treasurer to count ballots; and that precinct workers were heard to have solicited votes for the incumbent Mayor.

The petition concludes:

“Now therefore we ask his Excellency the Governor, John A. Volpe, to intercede in the interest of good government and fair practice and exercise the provisions of Massachusetts General Laws Chapter 54, section 23 by appointing Supervisors in the coming Municipal election.”

The petitioners ask that supervisors be appointed for each voting precinct of each of the seven wards of the city. Attached to the petition are pages containing the signatures of at least ten qualified voters from each of the city's seven wards. In light of the above, you have asked the following:

“In view of the fact that Tuesday, October 12, was a holiday, I would like to be sure the petition was legally filed within twenty-one days of the date of the election. I also would like to be sure that the petition otherwise conforms with the requirements of the General Laws, chapter 54, section 23.”

General Laws c. 54, § 23 refers to a “written petition of ten qualified voters of a ward or of a town, presented at least twenty-one days before a state or city election therein. . . .” The present petition was filed on October 11, 1965, and relates to the election to be held on November 2, 1965. The Supreme Judicial Court has consistently held that “in computing time from the date, or from the day of the date, or from a

certain act or event, the day of the date is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises."

Bemis v. Leonard, 118 Mass. 505, 506
Roman Cath. Archbishop v. Board of Appeal,
 268 Mass. 416, 417

And the Court has further concluded: "It is the general rule that where time is to be computed from a particular day or from the day of a specified act, such day is excluded and the last day of the period is included in the computation."

Daley v. District Court of Western Hampden,
 304 Mass. 86, 94

Excluding November 2 (the date of the election) from the calculation, but including the last day of the period in question, the twenty-first day before the election was Tuesday, October 12.

Accordingly, it is clear that the petition was filed within the time period required by the statute, for—even excluding October 12 from the calculation—filing took place upon the twenty-first day prior to the election. It should be noted, however, that it is unnecessary to exclude the October 12 holiday, and that—in fact—it would be improper to do so. "Commonly in computing time limited to less than a week Sunday is excluded. Sunday is included in computation only where the time limited is of such length as necessarily to include one or more Sundays."

Roman Cath. Archbishop v. Board of Appeal, *supra*,
 at pages 417-418

Stevenson v. Donnelly, 221 Mass. 161, 163.

Legal holidays would presumably be treated in a similar fashion. [See G.L. c. 136, § 13, which section relates and applies portions of the so-called "Sunday Law" to the Commonwealth's legal holidays.] I find nothing in the language or the purpose of c. 54, § 23 which would support a conclusion that the normal treatment of Sundays and legal holidays referred to by the Supreme Judicial Court would not be applicable. October 12, despite its status as a legal holiday, must therefore be included in the calculation of the twenty-one day period. However, since the petition in question was actually filed on the twenty-second day prior to the election, it is clear that filing was timely irrespective of how the intervening legal holiday is to be treated.

Likewise, an examination of the petition indicates that it is in proper form, and reveals nothing which would serve to invalidate it. General Laws c. 54, § 23 is obviously designed to facilitate the making of requests for appointment of election supervisors.

"Upon the written petition of ten qualified voters of a ward or of a town, presented at least twenty-one days before a state or city election therein, the governor, with the advice and consent of the council, shall appoint for such ward or town or for each voting precinct named in the petition, two voters of the city or town, who shall not be signers of the petition or members of any political committee or candidates for any office, to act as supervisors at such election. . . ."

Mass. G.L., c. 54, § 23, as amended by St. 1962, c. 437, § 33. The statute is mandatory in nature, and—upon the presentation of a proper petition—the Governor is without discretion to refuse to make the requested appointments.

The Legislature has required only that a request be made, and that the requests be accompanied by the signatures of ten qualified voters from each ward for which supervisors are to be appointed. There are no other requirements. It is clear that the General Court has determined that election supervisors should be made available on the basis of an easily prepared and filed application, and that technical requirements and conditions are not to stand in the way of these appointments.

The fact that the petitioners in the present case have included with their request a number of unnecessary allegations with regard to suspected election offenses in the City of Somerville does not invalidate the petition. The petition complies with the statute in that a request for the appointment of election supervisors is made and the proper number of signatures are attached. Additional material does not alter the fact that a proper request has been made, and such material must be treated simply as surplusage. To rule otherwise would be to impose upon petitions filed under c. 54, § 23 a requirement of technical precision which the Legislature never intended, and which the statute simply does not contain, and to create unforeseen conditions upon the exercise of right guaranteed to qualified voters.

It should be emphasized that action by the Governor upon a petition of this nature is required by law, and does not in any way indicate that allegations contained in the petition have been found to be true. The statute contains no provisions which would authorize investigations or hearings, and it is not the responsibility of the Governor to decide whether such allegations have merit. The appointment of election supervisors under c. 54, § 23 in no way implies that any determination has been made with regard to the allegations of a specific petition or the conduct of elections in general in the municipality involved.

Should the Governor be vested with authority to determine that proper requests have been invalidated by the inclusion of additional material, the statute becomes discretionary rather than mandatory in nature. The statute in its present form requires that action be taken upon petitions with the appropriate number of signatures. Nothing in c. 54, § 23 indicates that the Governor is to decide which requests are proper and which are not. Such a determination would change the entire character of the statute, and could defeat rights of a substantial nature which the Legislature intended the electorate to have.

There is no doubt that the petition in question conforms completely with the requirements of c. 54, § 23. The fact that the petitioners attached signature sheets for each ward to a single petition rather than filing seven separate applications does not affect their right to have election supervisors appointed for each ward for which a sufficient number of valid signatures appears. Accordingly, it is my opinion that under the provisions of c. 54, § 23, and subject to the approval of the

Executive Council, you are obliged to make the appointments which have been requested.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Massachusetts Commission Against Discrimination is empowered to establish a new Division of Community Relations, and to appoint the head of such division, who will not be subject to the provisions of chapter thirty-one.

OCTOBER 26, 1965.

HON. MALCOLM L. WEBBER, *Chairman, Massachusetts Commission Against Discrimination*.

DEAR SIR:—I have your letter of October 20, 1965 requesting my opinion on the establishment by your Commission of a new division entitled the Division of Community Relations.

Your request for my opinion contains four questions, each of which appears below followed by my response.

1. Does the Massachusetts Commission Against Discrimination have the authority, by vote of its members, to create said Division of Community Relations?

Paragraph 3, § 56, G. L. c. 6, provides that, "All employees of the commission, except an executive secretary, field representatives, *the heads of divisions* and attorneys, shall be subject to chapter thirty-one. . . ." [Emphasis supplied.] This language was inserted in 1946 when the Commission was first established. (St. 1946, § 368.) The Commission at that time had no division or division heads. The Legislature would scarcely have referred to "heads of divisions" unless it had contemplated that from time to time the Commission would establish divisions. Section 3 of G. L. c. 151B empowers the Commission to carry on a wide range of functions. The Commission is not only to conduct hearings with respect to complaints of discrimination; it is to conduct research, and also to coordinate far-ranging programs of community relations, education and study (G. L. c. 151B, § 3, paragraphs 8 and 9.) These various activities lend themselves to grouping under a separate division or divisions. The newly created Division of Community Relations will evidently carry on the work authorized under G. L. c. 151B, § 3, paragraph 8, and, to some extent, paragraph 9.

It is my opinion that the Commission is empowered to create said division.

2. Is approval by the Governor or the Governor and Council, or any other body, or is any action, other than action by the Commission, necessary in order validly to create said Division of Community Relations?

General Laws, c. 30, § 3 provides:

"In all cases where the executive and administrative head of a

department is vested with authority to establish therein divisions not specifically provided for by law, the establishment of such divisions shall be subject to the approval of the governor and council."

However, this provision applies only to "a department." General Laws c. 30, § 1 defines "departments" as used in c. 30, to mean "all the departments of the commonwealth." The Commission Against Discrimination is not a "department of the commonwealth" but is a board or commission serving under the governor and council. G. L. c. 6, § 17. (See Article LXVI of the Amendments to the Massachusetts Constitution providing for organization of the executive and administrative work of the commonwealth into not more than twenty departments, but exempting those officers serving directly under the governor or council. The Commission Against Discrimination is specifically placed within the latter category by G. L. c. 6, § 17.)

Since G. L. c. 30, § 3 clearly does not apply, I know of no provision of law requiring the Commission to secure the approval of the Governor, Governor and Council, or other authority, as a precondition to the creation of a division.

3. Once said Division of Community Relations is established, does the Commission have the authority to appoint its head?

General Laws c. 151B, § 3(3), empowers the Commission to "appoint such attorneys, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties."

This statute authorizes the Commission to appoint the head of the Division of Community Relations.

4. Is the duly appointed head of said Division subject to the provisions of chapter thirty-one of the Massachusetts General Laws?

The final paragraph of G. L. c. 6, § 56 expressly exempts division heads from chapter thirty-one. The exemption of "heads of divisions" dates back to the original legislation establishing the Commission. St. 1946, § 368. Field representatives were not exempted until 1948, by St. 1948, § 411.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

There are no statutory barriers to the establishing, by the Commissioner of Mental Health, of a training center for selected personnel. However, in the teaching of electrology, it would be necessary to obtain approval of such a course of training from the Board of Registration of Electrologists. Furthermore, candidates who successfully complete the course must be licensed by that Board before they could put into practice the training they have received at this course.

OCTOBER 27, 1965.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR COMMISSIONER SOLOMON:—You state in your letter of July 26, 1965 that Mr. Harry A. Cowan, the president of a foundation incorporated under c. 180 of the General Laws, has presented a plan to provide training in electrology to some of your personnel. This plan calls for the establishment of a training center at which a number of the employees representing several of the institutions of which your department has charge “would attend a formal training course of one afternoon a week for approximately ten weeks” in “both the theory and practical application in the removal of facial hair by means of electrology.” You add that the training center would be at “a selected State Hospital. . . . Subsequent to the successful completion of the required course of instruction, the employees will return to their own hospital and apply, under medical supervision, the knowledge that they have attained in the courses.”

In connection with the implementation of this plan, you ask the following questions:

“1. Would there be any statutory barrier to our establishment of such a course of training?

“2. Would it be necessary to obtain approval of such a course of training from the Board of Registration of Electrologists, Division of Registration, Department of Civil Service and Registration?

“3. Would it be necessary for candidates who have successfully completed this course of training to obtain any type of licensure from the Board of Registration of Electrologists, Division of Registration, Department of Civil Service and Registration, before they could put into practice at their own institutions, under medical supervision, the training they have received at this course?”

I shall answer your questions in the order presented.

(1) I find no statutory barrier to the establishment of the “course of training” outlined in your letter at any of your institutions. On the contrary, I call your attention to G. L. c. 123, § 3, which provides for the supervision and control of all public institutions for the mentally ill by your department. As amended St. 1956, c. 715, § 8. The words “supervision and control” of public institutions are sufficiently broad to permit the establishment of courses of training for your personnel when such courses will benefit the patients under their charge.

(2) I call your attention to G. L. c. 112, § 87LLL which requires

both schools and teachers of electrolysis be duly licensed by the board. General Laws c. 112, § 87LLL says, in material part, that:

"The board and the commissioner of public health, acting in an advisory capacity, shall further establish standards to be met by said electrolysis school and shall require the school to maintain the prescribed course of study. When in the opinion of the board such standards have been met by said school, a license of approval shall be awarded to it. No school, not so licensed, may teach electrolysis."

Electrology must be taught in a school licensed by the Board, by personnel licensed by the Board and such school must meet standards prescribed by the Board including a prescribed course of study. The Department of Mental Health may establish such a school but it must meet these requirements. Accordingly, I answer your second question in the affirmative.

(3) Section 87FFF of G. L. c. 112 reads as follows:

"No person shall engage in the practice of electrolysis or hold himself out as a practitioner of, or being able to practice, electrolysis unless he is duly licensed by the board or is a qualified physician registered under the laws of the commonwealth. Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars."

This statute clearly requires that any person engaging in the practice of electrolysis, whether at a state hospital or anywhere else in this Commonwealth, be licensed by the Board of Registration of Electrologists.

It is axiomatic that the purpose of this registration statute is to protect the general public from incompetent practitioners of electrolysis. Certainly the people in public institutions are entitled to at least the same protection. I am aware of the opinion rendered on February 20, 1941 by the then incumbent of this office to the then Director of Registration on a similar subject matter. I am of a different view. General Laws c. 112, §§ 87EEE to 87OOO (Registration of Electrologists) clearly require that any person engaging in the practice of electrolysis in the Commonwealth must be licensed, and I find no basis for reading an exception into this unequivocal language.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

It is constitutional and lawful for the General Court to enact legislation affecting the pension rights of a Justice where those rights accrued prior to the enactment of the legislation.

NOVEMBER 4, 1965.

HON. JOHN J. MCCARTHY, *Commissioner of Administration*.

DEAR COMMISSIONER MCCARTHY:—I have your request of October 20, 1965 wherein you pose a question relative to the effective date of a pension for a deceased Justice of the First District Court of Essex.

You state that the Justice died on February 3, 1964, prior to the enactment of c. 464, Acts of 1964 but subsequent to the effective date of that act.

The resolution of this matter, therefore, involves the validity of a retrospective act of the General Court. Or, put in other terms, is it constitutional and lawful for the General Court to enact legislation affecting the pension rights of the Justice in question where those rights accrued prior to the enactment of the legislation?

The answer to your question is clearly in the affirmative. Our Supreme Judicial Court has stated in *Ford v. Retirement Board of Lawrence*, 315 Mass. 492, 494 (1944):

“ . . . The Legislature may prescribe the terms and conditions of pensions and retirement allowances, place the burden of paying them on cities and towns, and pass retroactive statutes with reference to pensions and retirement payments. . . . ”

Under the appropriate statute, viz., c. 32, § 65C, the widow of the deceased Justice is entitled to the pension allowable thereunder from the date of the Governor's approval thereof, effective February 4, 1964.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

It is constitutionally and statutorily permissible, for the Legislature to provide that the Commonwealth pay local taxes on property that it occupies if under the terms of a lease it agrees to be responsible for such taxes.

NOVEMBER 4, 1965.

HON. WILLIAM G. DWYER, *President, Board of Regional Community Colleges*.

DEAR PRESIDENT DWYER:—In your letter of July 29, 1965 you request an opinion as to whether the payment of property taxes levied by the City of Boston on real estate leased from Boston University and occupied by the Massachusetts Bay Community College would be “legal.” I infer that the taxes are to be paid from the appropriation contained in St. 1965, c. 541, Item 1361-00, which reads:

“1361-00 Massachusetts Bay Community college, including not more than fifty-three permanent positions . . . \$69,542”

In a leading case, *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 390, the Supreme Judicial Court held that when the Commonwealth is the lessor of real property, it *must* pay appropriate local taxes on such property unless excused by statute or agreement. To the same effect are *Gloucester Ice & Cold Storage Co. v. Assessors of Gloucester*, 337 Mass. 23, 30-34 and *Atlantic Refining Co. v. Commonwealth*, 339 Mass. 12, 13-14. The Court reasoned in the *Boston Molasses* case that the Commonwealth engages in the affairs of the marketplace on the same terms as any other party.

Applying this principle to the facts stated in your letter, I am of the opinion that it is "legal," i.e., constitutionally and statutorily permissible, for the Legislature to provide that the Commonwealth pay local taxes on property that it occupies if under the terms of a lease it agrees to be responsible for such taxes.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Real Estate Review Board is not required by law to determine the compensation to be paid to the Revere Housing Authority for the taking of real property from it for a parking lot by the Metropolitan District Commission under the authority of chapter 515, Acts of 1960.

NOVEMBER 5, 1965.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works*.

DEAR COMMISSIONER SARGENT:—The following is in reply to your letters of August 2, and October 21, 1965 concerning the request by the Board of Review for a hearing by the Revere Housing Authority for the taking of land for a parking lot by the Metropolitan District Commission under the authority of Chapter 515, Acts of 1960.

In your letters of August 2, and October 21, 1965 you asked the following specific questions:

"1. Is the Real Estate Review Board required to act in a quasi judicial capacity to determine the land damages to be paid to a city, town, authority or state agency if neither party is the Department of Public Works?

"2. If the answer to question 1 is in the affirmative, who is required to pay the compensation of the Review Board for said service?

"3. Is the Real Estate Review Board required by law to determine the land damages to be paid to the Revere Housing Authority for the taking of its land for a parking lot by the Metropolitan District Commission under the Authority of Chapter 515, Acts of 1960?"

Chapter 403 of the Acts of 1954, "An Act Providing For An Accelerated Highway Program," authorized and directed in Section 1 that the State Department of Public Works and the Metropolitan District Commission expend certain sums of money:

"for projects for the laying out, construction, reconstruction, resurfacing and relocation of highways, parkways, bridges, grade crossing eliminations and alterations of crossings at other than grade, for traffic safety devices on state highways, parkways and on roads constructed under the provisions of section thirty-four of chapter ninety of the General Laws and for traffic studies."

Similar language authorizing the expenditure of funds for such purposes appears in subsequent statutes authorizing the construction and financing of specified highway projects.

The Real Estate Review Board was created by Section 6, Chapter 403, Acts of 1954. It has been continued in each subsequent statute authorizing the financing and construction of highways by the State Department of Public Works.

In connection with those projects said Chapter 403 of 1954 provided that the "department and the commission may . . . take by eminent domain . . . public or private lands . . . for carrying out the provisions of this act . . . ; *provided, that no damages shall be paid for public lands or parks, parkways or reservations so taken.*" [Emphasis supplied.]

Chapter 693, Acts of 1955 provides in Section 1:

"Notwithstanding any provisions of law . . . authorizing the taking by eminent domain or otherwise of certain public lands for highway improvements without the payment of damages therefor, the state department of public works or such other department, authority or public agency as may be involved is hereby authorized and directed to pay to the city, town, department, authority or agency in possession of lands so taken, transferred or used an amount to be mutually agreed upon."

Chapter 657 of the Acts of 1957 amended Chapter 693 of the Acts of 1955 by providing that if "the parties concerned are unable to mutually agree . . . the matter shall be *referred to the real estate review board* created by section six of chapter four hundred and three of the acts of nineteen hundred and fifty-four which shall determine the amount to be paid and said determination shall be final." [Emphasis supplied.]

The language of Chapter 693 of the Acts of 1955 stating ". . . provisions of law . . . authorizing the taking . . . of certain public lands for highway improvements without the payment of damages therefor" refers to projects such as those of the type specifically described in Chapter 403 of the Acts of 1954 and subsequent Highway Bond Issue Statutes.

The Metropolitan District Commission was "authorized and directed" by Chapter 515 of the Acts of 1960 to take certain land owned by the Revere Housing Authority "for the purpose of constructing and thereafter maintaining and operating thereon a public parking area." That project is not referred to as a "highway improvement" in said Chapter 515. There is no reference to the Review Board in said Chapter 515 of 1960. The Metropolitan District Commission complied with said Chapter 515 by an order of taking, dated September 20, 1962.

Parking areas of the type authorized by Chapter 515, Acts of 1960 have not been included in the specific types of projects described in Chapter 403 of the Acts of 1954 and subsequent Highway Bond Issue Statutes. The phrase "highway improvements" in Chapter 693 of the Acts of 1955, as amended, was used by the Legislature to describe the specific types of projects referred to in the statutes creating and continuing the Review Board.

The Real Estate Review Board is required to determine land damages to be paid to a city, town, authority or state agency, though neither party may be the Department of Public Works, provided that the project causing such damages, its authorization and the funds for the payment therefor derive from Chapter 403 of the Acts of 1954 or subsequent Bond Issue Statutes that impose responsibilities upon said Board in the implementation of "highway improvements."

Compensation of the Real Estate Review Board shall be paid from the funds made available by the bond issue or other appropriation for the project from which the specific case or cases being considered by said Board arise.

The Real Estate Review Board is not required by law to determine the compensation to be paid to the Revere Housing Authority for the taking of real property from it for a parking lot by the Metropolitan District Commission under the authority of Chapter 515, Acts of 1960.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Gloucester Community Pier Association, Inc., can sub-lease part of the Gloucester Fish Pier without the permission of the Department of Public Works. However, no sub-lessee can operate any part of the pier in violation of specific legislative restrictions on, and directions for the use of the premises, or the Declaration of Trust of the Association, dated April 21, 1937.

NOVEMBER 5, 1965.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works*.

Re: *Gloucester Community Pier Association Lease*.

DEAR COMMISSIONER SARGENT:—You have requested my opinion on two questions which concern the lease between the Commonwealth of Massachusetts and the Gloucester Community Pier Association, Inc.

Chapter 311, Acts of 1931 provided for the construction and leasing by the Commonwealth of a fish pier in Gloucester for the purpose of improving Gloucester Harbor and its commercial fishing facilities. Chapter 303, Acts of 1936 amended said Chapter 311 of 1931 in its entirety. Chapter 29, Acts of 1937, effective on February 15, 1937, defined the corporation which was to be the lessee from the Commonwealth of the new pier and surrounding flats and harbor.

The Gloucester Community Pier Association, Inc., hereinafter on occasion referred to as the Association, was certified by the Commissioner of Corporations and Taxation as qualifying under the provisions of Chapter 303 of 1936. On February 26, 1937 the Commonwealth and the Association executed a lease covering the pier and environs in East Gloucester pursuant to the three statutes cited in the next preceding paragraph. On March 1, 1936 the Commonwealth and the Association executed an agreement concerning construction of the pier and harbor facilities. On April 21, 1936 the Association declared itself trustee of all its interest in the leased property, ". . . to hold, use, occupy, maintain,

improve and operate the same in trust to and for the benefit of all persons engaging in the fish and fishing industries, without discrimination. To this end the said property and facilities shall be operated in such manner as to make such facilities available at the lowest charges consonant with good management and without ultimate profit to the said Corporation or its members, either directly or indirectly."

Since 1937 the original lease has been extended from time to time with various changes of rental under the authority of Chapter 653, Acts of 1945, Chapter 663, Acts of 1947, Chapter 650, Acts of 1958, Chapter 675, Acts of 1960, and Chapter 609, Acts of 1965. Your attention is invited to the fact that the Department of Public Works was unable to provide this Department with copies of the 1945, 1947, and March 28, 1960 extensions of the lease. This opinion, therefore, is based upon the 1937 lease and the probable contents of its extensions.

Your first question is:

"Under the conditions of the lease, can the Gloucester Community Pier Association, Inc., sub-lease a part of the Gloucester Fish Pier without permission of the Department?"

It is my opinion that the Gloucester Community Pier Association, Inc., can sub-lease part of the Gloucester Fish Pier without the permission of the Department of Public Works. The lease between the Commonwealth and the Association, dated February 26, 1937, includes on page 4 the provision:

"... and the lessee further covenants and promises with and to the said lessor that it or others having its estate in the premises will not, without the consent of the lessor first obtained in writing, assign this lease ..."

This is the only language in the entire lease which defines any restraint upon the power of the lessee to convey its interest to another. It is to be noted that there is no language in the lease which could be construed as a limitation of the power of the lessee to sub-lease the premises.

Chapter 29 of the Acts of 1937 contains the following language:

"Said lessee corporation, if not the City of Gloucester, shall be a corporation organized for the purpose of administering said pier and its facilities without profit and in such manner that said pier and its facilities shall be available, to the extent of their capacity, to fishermen, fish dealers and the fishing industry generally, *subject to such reasonable regulations under the lease as the corporation may deem necessary or desirable for the purpose, and to the right of the corporation from time to time to sublease or license the use of portions of such pier or its facilities, or structures on such pier, to persons engaged in the fishing industry or business incidental thereto ...*" [Emphasis added.]

There is no conflict between the lease provision against assignment and the legislative phrase permitting sub-leasing. An assignment is a distinctly different and more complete transfer of an entire interest in property. A sub-lease permits control of property or its use to be defined

and enforced by a lessor to whatever extent may be desired and included in such an instrument.

"The distinction between an assignment and a sublease of demised premises is well-established. A transfer by the lessee of the whole or a specific part of the leasehold estate for the residue of the term is an assignment. A transfer by the lessee of the whole or a specific part of the leasehold estate for a part of the term is a sublease." *Marcelle, Inc. v. Sol. and S. Marcus Co.*, 274 Mass. 469 (1930).

Both the existing lease and the enabling act empower the Gloucester Community Pier Association, Inc., to sub-lease and to license the use of the premises under lease. Nowhere does there appear a requirement of written approval by the Department of Public Works of any sub-lease or license. However, it must be noted that the authority to sub-lease or to license is limited to the sub-lessees or licensees being engaged in the fishing industry or in a business connected with fishing. The Association must comply with its Declaration of Trust of April 21, 1937 and with the previously cited enabling legislation in order to exercise effectively its power to sub-lease or license.

Your second question is:

"Also, can a sub-lease operate any part of the pier in such a manner that it is not open to all on an equal basis?"

Generally a sub-lessee acquires possession of the leased premises for that period of time defined in the sub-lease. A sub-lessee pays rent for a right of possession. Therefore, as a general rule he is entitled to operate the leased premises which he sub-leases in such a manner that his possession is uninterrupted. In those general circumstances a sub-lessee could operate part of the leased premises so that they were not open to all on an equal basis. However, a sub-lessee can acquire no rights in the premises greater than those of the lessor. In this instance there are specific legislative restrictions on and directions for the use of the premises included in the previously cited enabling legislation. No sub-lessee could operate any part of the pier in violation of those legislative mandates or the Declaration of Trust of the Association, dated April 21, 1937.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Upon the death of a patient who has not executed a written authorization for an inspection of records, inspection of medical records of the Soldiers' Home may be accomplished only by judicial order.

NOVEMBER 15, 1965.

HON. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea*.

DEAR COMMANDANT QUIGLEY:—I am in receipt of your letter of October 7, 1965, requesting my opinion regarding the release of medical records and autopsy findings to the next of kin of deceased patients.

Your letter raises two questions: is the Soldiers' Home to be governed by the provisions of G. L. c. 111, § 70, and; if so, how are the provisions of that section to be applied.

G. L. c. 111, § 70, which regulates the inspection of medical records, provides in part as follows:

"Hospitals, dispensaries or clinics, and sanatoria licensed by the department of public health or supported in whole or in part by the commonwealth shall keep records of the treatment of the cases under their care and the medical history of the same. . . . such records and similar records kept by such hospital, dispensary or clinic, or sanatorium, except a hospital or clinic under the control of the department of mental health, *may be inspected by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient. . . .*" [Emphasis added.]

From a reading of the language of the above-quoted provision, it is manifest that application of § 70 is limited to two specific categories of hospitals, clinics, dispensaries and sanatoria: (1) those licensed by the Department of Public Health; and (2) those supported in whole or in part by the Commonwealth. Despite these limitations on the scope of § 70, the section is considerably broader in its present application than it was at the time of an earlier opinion of the Attorney General dated January 2, 1962, and referred to in your request. At that time, application of § 70 was restricted solely to institutions licensed by the Department of Public Health. The earlier provision for the application of § 70 to "hospitals supported in whole or in part by contributions from the Commonwealth or from any town. . . ." was eliminated by the 1956 amendment. As a result, therefore, of the limited scope afforded by the 1956 amendment, providing for the application of § 70 only to institutions licensed by the Department of Public Health, it was the opinion of this office that the Soldiers' Home was not within the purview of the provisions of § 70. However, in view of the 1964 amendment which broadened the applicability of § 70 by replacing within the scope of the section institutions supported by the Commonwealth, the earlier opinion is now obsolete.

Since the Soldiers' Home is an institution supported at least in part by the Commonwealth, it meets one of the current criteria for application of § 70. Accordingly, it is my opinion that the inspection and furnishing of medical records of patients of the Chelsea Soldiers' Home are to be governed by the procedures of § 70.

So far as the application of § 70 is concerned, records may be inspected by the patient to whom they relate or by his attorney upon written authorization by the patient. They may also be inspected upon judicial order or—under certain circumstances—upon the order of the head of the State Department having jurisdiction over the institution in question. This statutory language is clear and concise. In the situation that you have cited—in which the patient has died without executing a written authorization—only a judicial order can authorize next of kin or interested parties to inspect such records. The medical records of such a deceased patient would thus be available to his family and/or their attorney in connection with pending proceedings.

It is my opinion, therefore, that when the patient is dead and there is no written authorization from him, inspection of medical records of the Soldiers' Home may be accomplished only by judicial order. To this extent, I affirm the conclusions reached in the earlier opinion of my predecessor in this Department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

There is no constitutional barrier to the use of public funds by the Massachusetts Rehabilitation Commission in connection with the training of a handicapped person toward employment as a priest.

NOVEMBER 22, 1965.

HON. FRANCIS A. HARDING, *Commissioner, Massachusetts Rehabilitation Commission*.

DEAR SIR:—You have requested my opinion as to whether there is any constitutional barrier to the use of public funds by your Commission in connection with the training of a handicapped client toward employment as a priest. You indicate that the client, who is otherwise qualified to receive the Commission's assistance, has the necessary approval of the Diocese of Worcester to "... enter a seminary to attain the priesthood rank and to work as a secular priest. . . ."

In response to a similar question which you raised in a letter dated May 16, 1962, my predecessor in this Department issued an opinion on June 1, 1962, stating in part:

"... Your commission is empowered to administer a general program to aid handicapped persons. The rendering of such services is similar to the provision of free transportation and other aids to students attending both public and parochial schools which has been held not to offend either the State or Federal Constitutions. . . . In all such cases the aid is given or the services rendered to individuals and not to religious institutions. Therefore, it is my opinion that there is no conflict between any State or Federal constitutional . . . [provision] regarding the separation of Church and State and your commission's extending its services to an otherwise eligible person who intends to become a priest." [Citing *Everson v. Board of Education*, 330 U.S. 1.]

Your present request raises, in essence, the same question as that presented in your May 16, 1962 letter. The earlier opinion, from which I have quoted, still expresses the law with respect to the constitutional prohibition against "establishment of religion" by the State. Nothing contained in the "school prayer" opinions rendered by the United States Supreme Court in 1963 [*School District of Abington Township, Pa. v. Schempp* and *Murray v. Curlett*, 374 U.S. 203] affects this conclusion. Accordingly, it is my opinion that there is still no barrier to your Commission extending its rehabilitation services to an otherwise eligible person who intends to enter the priesthood.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A person shall not at the same time receive more than one salary from the treasury of the commonwealth, irrespective of how unrelated the positions in question may be.

NOVEMBER 22, 1965.

MAJOR GENERAL JOSEPH M. AMBROSE, *The Adjutant General*.

DEAR SIR:—I am in receipt of your recent request for an opinion concerning the employment of Brigadier General Theodore W. Gramstorff as a Range Officer, a full-time post for which the maximum salary is \$117.85 per week. You have indicated that General Gramstorff presently holds the position of State Inspector for the Military Division of the Commonwealth under the provisions of G.L. c. 33, § 15(1). The duties of the State Inspector are apparently part-time in nature, and General Gramstorff would continue to perform them while functioning as Range Officer.

Both the position of State Inspector and that of Range Officer are within the Military Division of the Commonwealth, and the salaries of each are paid out of appropriations made for the Division by the General Court. You have asked whether General Gramstorff may lawfully hold these positions simultaneously, and receive a salary for each. You have informed me that General Gramstorff is receiving no compensation for performing the duties of either position pending a determination by the Department of the Attorney General.

General Laws, c. 30, § 21 provides as follows:

"A person shall not at the same time receive more than one salary from the treasury of the commonwealth."

Although there is no prohibition against the receipt of compensation on a consultant basis from more than one governmental source, c. 30, § 21 does impose a strict bar against the receipt of two regular salaries. The positions of State Inspector and Range Officer are compensated from the so-called "01" accounts—i.e., the incumbent of each position is paid on a regular salary basis, and is not paid as a consultant.

I am aware of the fact that the duties of State Inspector may be accomplished during General Gramstorff's off-duty hours, and that they would probably not conflict with his regular employment as Range Officer. However, the operation of c. 30, § 21 does not depend upon an actual or potential conflict between the positions involved. This section prohibits the receipt of two salaries, irrespective of how unrelated the positions in question may be. General Gramstorff may of course serve and be compensated as either Range Officer or State Inspector. But I can only conclude—in light of the clear language of c. 30, § 21—that receipt of compensation for both positions would constitute a violation of the General Laws of the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

If a person brings an appeal under the provisions of c. 31, § 46A wherein c. 31, § 43 has not been complied with and the Civil Service Commission determines that the rights of the complainant have been prejudiced, the complaint should be immediately restored without loss of compensation or other rights; if it is determined that the rights of the complainant have not been prejudiced, the complaint should be denied.

NOVEMBER 22, 1965.

MISS LAURETTA L. KELLAHER, *Secretary to the Commission, Division of Civil Service.*

DEAR MISS KELLAHER:—In your letter of September 2, 1965 you have asked my opinion with regard to the present provisions of G. L. c. 31, § 46A. Your specific question is as follows:

“If a person brings an appeal under the provisions of said Section 46A wherein G.L. c. 31, § 43, was not complied with, is the Civil Service Commission required to reinstate, or is it simply a matter of giving the Civil Service Commission a right to hear the case on the merits and make a decision as to whether the action of the appointing authority was justified?”

The provisions of G.L. c. 31, § 46 are integrally related to G.L. c. 31, § 43(a). The latter section sets forth the procedure for discharging, laying off, transferring or taking other specific action against persons protected by that section.

Where the agency head is alleged to have proceeded illegally, the employee may bring a petition for mandamus pursuant to G. L. c. 31, § 46A, asking that the action be set aside and that he be reinstated.

G. L. c. 31, § 46A.

“The supreme judicial court shall have jurisdiction of any petition for a writ of mandamus for the reinstatement of any person alleged to have been illegally removed from his office or employment under this chapter; provided, that such petition shall be filed in said court within six months next following such allegedly illegal removal, unless said court for cause shown extends the time.” (As enacted by St. 1930, c. 243.)

It is well established by decisions of our Supreme Judicial Court that a discharge involving failure to follow exactly the procedures in § 43(a), constitutes an illegal discharge requiring the immediate reinstatement of the employee.

Chartrand v. Registrar of Motor Vehicles.

347 Mass. 570 (1964)

Bois v. Mayor of Fall River,

257 Mass. 471 (1926)

Peckham v. Mayor of Fall River,

253 Mass. 590 (1925)

It is equally well established that mandamus raises only procedural matters and that if the employee, instead of bringing mandamus,

requests a review under § 43(b), procedural deficiencies would be waived.

Beaumont v. Director of Hospitals and Superintendent of Boston City Hospital,

338 Mass. 25 (1958)

Daley v. District Court of Western Hampden.

304 Mass. 86 (1939)

By St. 1959, c. 569, § 5, a second paragraph was added to § 46A. The judicial remedy was retained. A new administrative remedy was added. Under the present section, as amended, the employee may file with the Civil Service Commission a complaint "set[ting] forth just how the appointing authority has failed to follow the requirements of § 43." He may file this complaint separately or he may combine this complaint with "[a] request . . . for a hearing under the provisions of said [§ 43]."

G. L. c. 31, § 46A.

* * * *

"If any person alleges that his employment or compensation has been affected by action of the appointing authority in failing to follow the requirements of section forty-three, he may file a complaint with the civil service commission within seven days, exclusive of Saturdays, Sundays and holidays, after the said action has been taken. Said complaint shall set forth just how the appointing authority has failed to follow the requirements of section forty-three. This complaint may be filed with the request of the said person for a hearing under the provisions of said section forty-three and if it is determined by the civil service commission that the said authority has failed to follow the requirements of section forty-three and that the rights of said person have been prejudiced thereby, the said commission may order the said appointing authority to restore immediately said person to his employment without loss of compensation or other rights."

Where a complaint is filed only under § 46A, the issues to be determined by the Commission are specifically set forth in the text of the section cited above. The Commission must make two determinations. *First*, has the appointing authority failed in some way to follow the requirements of § 43? *Secondly*, has this failure prejudiced the rights of the complainant? Such a determination is similar, if not identical, to the finding required of a court in mandamus. The only difference is that the tribunal is administrative, not judicial. These determinations are procedural, and, as in mandamus, it would be improper to make any decision on the merits.

Where a § 46A complaint is combined or filed with a request for a § 43 hearing, an additional determination with regard to the merits might be required of the Commission. This would be the situation where the procedural issues were not determinative of the case. In such an instance, the Commission would be required to pass on the merits.¹

Once the Commission renders its decision, § 46A states in permissive language that "the said commission may order the said appointing

authority to restore immediately said person to his employment without loss of compensation or other rights." The mandamus cases, however, have established that an employee must be immediately reinstated where he is prejudiced by a procedural failure.

Your question is discussed at length above. It might be of some aid, however, if my opinion were set out in an outline form, which follows:

¹ A request filed solely under § 43(b) would raise only the merits of the case.

§ 46A Matters.

1. If the commission determines there has been no failure to follow § 43, the complaint should be denied.

2. If the commission determines that there has been a failure to follow § 43 but that the rights of the complainant have not been prejudiced, the complaint should be denied.

3. If the commission determines that there has been a failure to follow § 43 and that the rights of the complainant have been prejudiced, the complainant should be immediately restored without loss of compensation or other rights.

Combined Matter (§ 43 and § 46A).

4. If the commission determines there has been no failure to follow § 43, the commission should proceed and determine the case on the merits.

5. If the commission determines that there has been a failure to follow § 43 but that the rights of the complainant have not been prejudiced, the commission should proceed and determine the case on the merits.

6. If the commission determines that there has been a failure to follow § 43 and the rights of the complainant have been prejudiced, the commission should not proceed to a determination on the merits but the complainant should be immediately restored without loss of compensation or other rights.

§ 43 Matters.

7. The commission should make its determination on the merits.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

"State colleges" does not include the office and personnel within the Division of State Colleges employed by the Trustees.

Section 4B of Chapter 73, M.G.L. applies only to those persons elected to the faculty of a state college prior to September 26, 1965. The provisions of said section are superseded by St. 1965, c. 572, § 44 with regard to teachers unelected on the effective date of St. 1965, c. 572 or employed thereafter.

The term "approval" (as used in St. 1965, c. 572, § 45 (b)) means a thorough check to insure that the transfer papers are in order and that the administrative procedures have been complied with.

Only those persons employed by the state colleges on the effective date of St. 1965, c. 572 as civil servants and persons covered by G. L. c. 30, §§ 9A and 9B retain their respective coverage after the effective date of the new legislation. The provisions of G. L. c. 30, §§ 9A and 9B and G. L. c. 30 shall have no application to persons not covered on the effective date or persons employed thereafter.

NOVEMBER 22, 1965.

MR. JOHN GILLESPIE, *Director, Division of State Colleges.*

DEAR MR. GILLESPIE:—You have asked my opinion in reference to certain problems raised by the recent passage of St. 1965, c. 572. In the text of your letter you have asked a series of questions relating to this statute. Two of them were already numbered. The other questions have also been numbered. The two questions previously numbered have been renumbered to reflect the order in which they appear in your letter.

1. Does the term "state colleges" as used in sections 44, 45 and 45(c) include the office and personnel of the Division of State Colleges?

The Division of State Colleges is referred to as an entity in G. L. c. 73, § 1D. This section authorizes the division to "have a common seal, which may be altered by the trustees." No mention is made in this section of the composition of the division. This must be ascertained from the chapter as a whole.

In § 1 of c. 73, the trustees are authorized to "adopt, amend or repeal such rules and regulations for the government of any such college, for the management, control and administration of its affairs, for its faculty, students and employees, and for the regulation of their own body, as they deem necessary." Various additional powers with regard to personnel and the administration of the state colleges are given to the trustees in § 16. Certain of the powers may be delegated to the director of the Division of State Colleges or any officer of a state college.

The term "state colleges" is not specifically defined in G. L. c. 73. In § 10 the term "state college" as used in §§ 10-18 of this chapter is required to include the Massachusetts College of Art. This would infer that the state colleges comprise a number of individual institutions. These institutions are not listed collectively in any one section. Individual colleges are referred to, however, in various sections: i.e., Massachusetts College of Art and Massachusetts Maritime Academy in § 1, the college

at North Adams in § 2, the colleges at Boston, Fitchburg and Lowell in § 3.

Though the term "state colleges" is not defined in G. L. c. 73 and each college is not listed, it is clear that the term "state colleges" means those institutions known as "state colleges" located throughout the Commonwealth, including their respective employees.

There is nothing in the provisions of St. 1965, c. 572 to indicate a different result. The old board of trustees is abolished by § 40. The composition of the new board is defined in § 3. The length of office of each trustee is set in accordance with § 50.

The state colleges are dealt with in §§ 44 and 45. In § 44 the "professional staff . . . of the state colleges shall serve at the pleasure [of the board of trustees]." Under § 45, the provisions of G. L. c. 30, §§ 9A, B and G. L. c. 31 "shall not apply to persons employed at the state colleges subsequent to the effective date of this act."

No mention is made in St. 1965, c. 572 of the Division of State Colleges except indirectly by amendment of the first paragraph of G. L. c. 73, § 1. The term "Division of State Colleges" was not deleted by amendment from G. L. c. 73. The interrelationship between the three entities, the Division of State Colleges, the Board of Trustees of State Colleges, and the state colleges remains the same as established by G. L. c. 73.

This relationship is not dissimilar from many other state agencies. The subdivision of the Commonwealth is entitled "Division of State Colleges." The two entities within this agency are the Board of Trustees of State Colleges and the individual institutions known collectively as the state colleges.

The Board of Trustees or the director of the Division of State Colleges by authority of the Board and the individual state colleges are the employing authorities. Persons employed by these entities are in a sense all employees of the Division of State Colleges since they are within that subdivision of the Commonwealth. The converse is not true. Not all employees of the Division of State Colleges are directly employed by the state colleges.

The specific term used in St. 1965, c. 572, §§ 44, 45(c) is "state colleges." In answer to your first question, on the basis of the language used in these sections and the organizational structure established in G. L. c. 73, it is my opinion that the term "state colleges" does not include the office and personnel within the Division of State Colleges employed by the trustees. These employees do not come within the reorganization act and their status is unaffected by this legislation.

2. Does the provision [St. 1965, c. 572, § 44] then supersede Section 4B of Chapter 73 of the General Laws as far as professional persons newly employed by the Division and the colleges are concerned after the effective date of the said Chapter 572?

General Laws c. 73, § 4B provides that a teacher may become eligible for election to the faculty of a state college after three years employment. Elections under the statute are not automatic, but are discretionary with the Board of Trustees. Upon election the board employs the

teacher "to serve at its discretion." An elected teacher may be dismissed only by following a prescribed procedure.

G. L. c. 73, § 4B.

"The board of trustees, in electing a teacher in a state college or the Massachusetts college of art who has served as such for the three previous consecutive school years, shall employ him to serve at its discretion, and, notwithstanding any contrary provision of general or special laws, he shall not be dismissed from such employment except for just cause and for reasons specifically given him in writing by the said board. Before any such removal is effected, the said teacher, upon his request, shall be given a full hearing before said board, of which hearing he shall have at least thirty days written notice from said board, and he shall be allowed to answer charges preferred against him, either personally or by counsel."

The rights of persons who have gained tenure by election to the faculty of a state college are retained by St. 1965, c. 572, § 44. Under this section, the "tenure of office of any member of [the professional] staff on the effective date of this act shall not be impaired." Any such employee may only be discharged after a full hearing and written notice in accordance with § 4B.

Under § 44, professional persons not elected to the faculty on the effective date of St. 1965, c. 572 and persons employed thereafter serve at the pleasure of the Board of Trustees. The term "at the pleasure of their respective boards" has legal implications similar to the phrase "at its discretion" used in § 4B. (Cf. *Marrone v. City Manager of Worcester*, 329 Mass. 378 (1952); *Davis v. Boston Elevated Ry.*, 235 Mass. 482 (1920).)

The process by which this status is attained pursuant to § 44 is, however, quite dissimilar from § 4B. There is no three-year trial period or election by the Board of Trustees. Instead, a new employment relationship is created which stems entirely from this new act, a relationship which effectively supersedes § 4B.

In answer to question two, in light of this new legislation, it is my opinion that § 4B applies only to those persons elected to the faculty of a state college prior to September 26, 1965. The provisions of § 4B of c. 73 are superseded by § 44 with regard to teachers unelected on the effective date of said chapter or employed thereafter.

3. What is the meaning of the term "approval" [as used in Acts of 1965, c. 572, § 45(b): "that without the approval of the director of civil service and the director of personnel and standardization the employee shall not, as the result of such transfer, be placed in a position of the higher salary grade."]?

The provisions of St. 1965, c. 572 reorganize the Department of Education and the state colleges. The process of reorganization might well have destroyed certain employee benefits had such benefits not specifically been protected. Special provision is made saving those benefits earned under G. L. c. 30, §§ 9A and B, as well as G. L. c. 31. These benefits continue after the effective date of the statute.

One of the personnel benefits enjoyed by persons protected by permanent appointment to the Civil Service or by virtue of G. L. c. 30, §§ 9A and B is the right not to be transferred to another position without first obtaining the transferee's approval. The delay in or the failure to obtain such approval might effectively work to block the reorganization. In order to prevent such an impasse, the Legislature provided in § 45 that "any state employee may be transferred to any position in his respective employing unit so reorganized." By including this section, the General Court effectively prevented such a delay and authorized transfers without employee approval.

Such transfers are not free from certain conditions. The first of these is contained in the part of the statute quoted above. No transfer may be made outside of an employment unit. In addition, certain further conditions are imposed. An employee may not be transferred to a position paying a lower salary. Nor may an employee be transferred to a position paying a higher salary without the approval of the Director of Civil Service and the Director of Personnel and Standardization.

Section 45. "... provided, however, that to staff the said department and the state colleges as reorganized by this act, any such employee may be transferred to any position in his respective employing unit as so reorganized; provided further, however, (a) that the employee's salary shall not be reduced as the result of such a transfer; (b) that without the approval of the director of civil service and the director of personnel and standardization the employee shall not as the result of such a transfer, be placed in a position of higher salary grade. . . ."

The approval given by the Director of Civil Service and the Director of Personnel and Standardization does not imply an independent determination of the requirements of the various state colleges. The needs of a specific institution or the colleges collectively is a matter for the Board of Trustees. The "approval" here required is a thorough check to insure that the transfer papers are in order and that the administrative procedures have been complied with.

4. Does Section 45(c) of Chapter 572 of the Act of 1965 . . . [amend] Section 16 of Chapter 73 of the General Laws and thereby [remove] from the Division and the state colleges the restrictions imposed by Chapter 30 and 31 of the General Laws in regard to persons employed or newly employed by them or after the effective date of said Chapter 572?

Section 16 was added to G. L. c. 73 by St. 1963, c. 642, § 15. This section defines certain employee classifications and the powers of the trustees, and refers generally to personnel matters. General Laws c. 30 is mentioned only in regard to the "General Salary Schedule" and "nonprofessional personnel." No specific reference is made to G. L. c. 31.

The last paragraph states: "All officers and employees, professional and non-professional, of the colleges shall continue to be employees of the commonwealth . . . [with] the same privileges and benefits of other employees of the commonwealth. . . ." This paragraph and the section as a whole might have been construed as requiring civil service appoint-

ments and tenure benefits pursuant to G. L. c. 30. Such an interpretation cannot stand, however, if superseded by a latter enactment. (See *Pease v. Whitman*, 5 Mass. 380 (1809).)

The provisions of St. 1965, c. 572 are subsequent to St. 1963, c. 642. In § 45, the tenure of persons having such benefits under G. L. c. 31 and G. L. c. 30, §§ 9A and B were preserved. The section states: "Nothing in this act shall be construed to impair the . . . tenure . . . of any permanent civil service employee, or veteran covered by [G. L. c. 30, § 9A], or of any maintenance employees covered by [G. L. c. 30, § 9B], employed on the effective date of this act. . . ."

This saving clause extends, however, only to those persons employed prior to the effective date of St. 1965, c. 572 and covered by the respective sections of G. L. c. 30 or by civil service status. Persons whose rights have not vested prior to the effective date are not included. The three-year period under § 9A must have been served and the six-month period under § 9B must have been completed prior to the effective date. In the case of a civil service employee, the appointment must have been made prior to the effective date.

The problem of future employment is settled by § 45(c). This requires that "the applicable provisions of chapters thirty and thirty-one of the General Laws shall not apply to persons employed at the state colleges subsequent to the effective date of this act." By virtue of this provision persons employed on or after September 26, 1965 shall not be subject to civil service or benefit by c. 30, §§ 9A and B.

In answer to your last question, it is my opinion that only those persons employed by the state colleges on the effective date of St. 1965, c. 572 as civil servants and persons covered by G. L. c. 30, §§ 9A and B retain their respective coverage after the effective date of the new legislation. The provisions of G. L. c. 30, §§ 9A and B and G. L. c. 31 shall have no application to persons not covered on the effective date or persons employed thereafter.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The jurisdiction of the Personnel Appeals Board and the Civil Service Commission are mutually exclusive and not concurrent. A matter coming within the jurisdiction of the Personnel Appeals Board is not within the jurisdiction of the Civil Service Commission. In addition, there may be matters not coming within the jurisdiction of either agency.

The Personnel Appeals Board does not have jurisdiction to hear and dispose of a further appeal through the Grievance Procedure in instances where an applicant chooses to appeal to the Civil Service Commission or to the Personnel Appeals Board and such appeal is denied.

NOVEMBER 23, 1965.

REV. HUBERT C. CALLAGHAN, S.J., *Chairman, Personnel Appeals Board, Executive Office for Administration and Finance.*

DEAR FATHER CALLAGHAN:—You have asked my opinion in reference to a matter concerning the jurisdiction of the Personnel Appeals Board. Your specific questions are as follows:

"1. In instances where an applicant chooses to appeal to the Civil Service Commission or to the Personnel Appeals Board and his appeal is denied, does he then have the right to institute an appeal through the Grievance Procedure on the same matter?"

"2. In view of the facts as recited above, does the Personnel Appeals Board have jurisdiction to hear and to dispose of this appeal?"

In your letter of October 19, 1965, you set forth at length the facts upon which these questions are based. The facts are too extensive to set forth in their entirety in this opinion. Instead, a short review of the essential facts appears below in order to place these questions in the context in which they appear in your letter.

FACTS

An employee of a state agency sent what purported to be a letter of resignation on April 15, 1965. In a subsequent letter dated nine days later, he asked that the agency consider allowing him to retract his resignation. An initial hearing was held in regard to this matter. Two days after the hearing a letter was sent stating that the agency had considered the matter and had decided to let the resignation stand as accepted.

The individual then proceeded to file the matter as a grievance alleging that the resignation was obtained by duress. At each step of the grievance procedure it was denied for lack of jurisdiction. The matter is now pending before the Personnel Appeals Board on jurisdictional grounds.

On June 21, 1965, an appeal was filed with the Civil Service Commission. The appeal alleged that the resignation was coerced. A hearing was held. The appeal was dismissed by the Civil Service Commission on August 26, 1965 for lack of jurisdiction.

DISCUSSION

1. The Personnel Appeals Board (hereinafter the Board) is an administrative appellate tribunal. It is the last step in the grievance procedure. The jurisdiction of the Board is set forth in G. L. c. 30, § 53. Under this section, the Board may hear matters "relating to classifications, hours of employment, vacations, sick leave or other forms of leaves of absence, overtime, and other matters relating to conditions of employment, except assignments of tours of duty."

The first five categories: "classification, hours of employment, vacations, [leave of absence] or overtime" are specific personnel problems. A resignation clearly does not relate to any of these. Any argument that a resignation is within the Board's jurisdiction must, then, be based on the last and more general category, "other matters relating to conditions of employment."

This phrase, as well as the statute as a whole, must be construed in accordance with the established canons of construction unless the Legislature has indicated a contrary intent. The *ejusdem generis* rule requires that general words such as "other matters" be limited by the more specific words or categories coming before them. [See *Commissioner of Corp. & Tax. v. Chilton Club*, 318 Mass. 285 (1945).]

No contrary intent is present. The word "relating" requires a reference back to the first five categories. The last category cannot stand alone, but must be read together with the first five. The fact that a resignation does not come within these five categories is a strong indication, if not an overriding determinant, that it does not come within the last one.

The term "conditions of employment" encompasses matters arising in the course of the employment relationship. It does not relate to preliminary negotiations at the hiring stage. Similarly, it does not refer to the process by which this relationship is terminated. In order to have a "condition of employment," a valid employment relationship must exist. Where one side contests the validity of the employment relationship, the issue is not a "condition of employment," though this may be involved, but the very existence of the relationship itself. This is not, therefore, a matter relating to the "conditions of employment" and is consequently not within the purview of G. L. c. 30, § 53.

In addition, under the National Labor Relations Act (See Title 29 U.S.C.) a forced resignation is treated as a constructive discharge in violation of § 8(a) (3) of that act. *N.L.R.B. v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238 (1st Cir. 1952). Though this statute is not at issue in this present matter, it does shed some light on the proper classification in terms of personnel problems of a discharge allegedly obtained under duress. A discharge or a removal is clearly not within the jurisdiction of the Board. (Compare G. L. c. 30, § 53 with G. L. c. 31, §§ 43, 46A.)

2. In the facts it states that the appellant filed an appeal with the Civil Service Commission (hereinafter the Commission). The provisions of G. L. c. 30, § 53 specifically exclude from the jurisdiction of the Board "[grievances] within the jurisdiction of the civil service commission or the contributory retirement appeal board." This is a limitation upon the powers of the Board. It cannot be construed as conferring jurisdiction in addition to the express statutory grant. A matter not

coming within the jurisdiction of the Commission does not by default fall into the jurisdiction of the Board. There may well be matters which do not come within the jurisdiction of either the Board or the Commission.

The powers of the Commission are found in various sections throughout G. L. c. 31. Those sections pertinent to the present discussion are §§ 43 and 46A. Under this latter section a complaint is correctly before the Commission where the petition properly alleges a failure to follow § 43 in discharging, removing, suspending, laying off, transferring, lowering in rank, or abolishing the complainant's position.

A complaint which alleged a resignation under duress states on its face a matter coming within the jurisdiction of the Commission. Such action, if proved, would amount to an illegal discharge or removal. The jurisdiction of the Commission would, however, be ousted where the complainant was unable to substantiate his claim of duress, since a voluntary severance is not within the Commission's jurisdiction.

In the present case, such a claim was filed with the Commission. A hearing was held. The matter squarely in issue at the hearing was the propriety of the resignation. The fact that the Commission voted to dismiss the complaint for lack of jurisdiction presumably indicates that it found the resignation proper and not obtained by duress.

This is not an instance where an individual lacked a forum in which to present his grievance. The matter was directly before the Commission. Judicial review of the Commission's decision may still be open. [See *Mayor of Newton v. Civil Service Commission*, 333 Mass. 340 (1955); *Chairman of the State Housing Board v. Civil Service Commission*, 332 Mass. 241 (1955).] Initially, a different course might have been pursued. [See G. L. c. 31, § 46A; *Martin v. City Manager of Worcester*, 1965 Adv. Sh. 822; *Warner v. Selectmen of Amherst*, 326 Mass. 435 (1950).]

CONCLUSION

In light of the above discussion and the precedent cited, in answer to your first question, it is my opinion that the jurisdictions of the Personnel Appeals Board and the Civil Service Commission are mutually exclusive and not concurrent. A matter coming within the jurisdiction of the Personnel Appeals Board is not within the jurisdiction of the Civil Service Commission. In addition, there may be matters not coming within the jurisdiction of either agency. In answer to your second question, the Personnel Appeals Board does not have jurisdiction to hear and to dispose of this appeal.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

House officers of the Medfield State Hospital practicing under limited licenses may write prescriptions for patients who are about to leave the hospital on temporary visits, and pharmacies not connected with the hospital may fill such prescriptions. However, §§ 9 and 9A, c. 112, M.G.L., provide that persons registered thereunder may practice medicine only under supervision, and furthermore, § 9A contains a provision forbidding the "prescribing or dispensing of any narcotic as defined in § 197 of c. 94, M.G.L." by a registered medical student.

NOVEMBER 23, 1965.

MR. ROMULUS DENICOLA, *Secretary, Board of Registration in Pharmacy.*

DEAR MR. DENICOLA:—You have requested answers to two questions posed by the Assistant Superintendent of the Medfield State Hospital in a letter to the Board of Registration in Pharmacy. The Medfield State Hospital is under the jurisdiction of the Department of Mental Health. Paraphrasing the Assistant Superintendent's letter, I will consider the following questions:

1. May house officers of the Hospital practicing under limited licenses write prescriptions for patients who are about to leave the hospital for a few days or a week "on temporary visits"?
2. May "outside pharmacies," i.e., pharmacies not connected with the Hospital, fill such prescriptions?

Subject to the conditions imposed by law, a duly registered pharmacist clearly may fill a prescription written by an authorized person. G. L. c. 112, §§ 24 and 30. The significant question, therefore, is the first one: namely, whether the house officers in question are authorized to prescribe for patients, knowing that these prescriptions will be filled outside the hospital while the patients are temporarily absent.

I assume, for purposes of this opinion, that the "house officers" are licensed under G. L. c. 112, §§ 9 or 9A. Section 9 concerns the registration of interns; § 9A, the registration of advance medical students. Having considered carefully both sections, I am of opinion that the registrants thereunder may prescribe for patients committed to their care in the circumstances described in the first question. Section 9 entitles interns to "practice medicine," albeit on a limited basis; on an even more limited basis, § 9A permits certain advanced medical students to engage in the "care . . . of persons requiring medical service." It is well-known that the practice of medicine and the care of persons requiring medical service frequently involves the prescription of drugs. See *State v. Henning*, 830 O.A. 445, appeal dismissed, 150 Ohio St. 48. Although practice under §§ 9 and 9A is limited to practice in hospitals (with certain exceptions in § 9A not relevant to this opinion), it is also well-known that many hospitals maintain out-patient clinics in which prescriptions are written for persons requiring drugs or medicines. Such prescriptions are frequently filled at "outside" pharmacies. In-patient service may also include the writing of prescriptions to be filled by the patient after his discharge. I assume that the Legislature was aware of

these facts when it enacted G. L. c. 112, §§ 9 and 9A, and, accordingly, I answer both questions "yes."

Because of the importance of these questions to the public health of this Commonwealth, I think it necessary to add a *caveat* to my answer. Sections 9 and 9A both provide that persons registered thereunder may practice only under supervision. Additionally, § 9A contains a provision forbidding the "prescribing or dispensing of any narcotic as defined in section one hundred and ninety-seven of chapter ninety-four" by a registered medical student. This opinion should not be construed as relaxing these provisions in any way.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

It is not permissible to pay damages for the taking of certain real property by the exercise of eminent domain from funds appropriated for another purpose. In the absence of specific language allowing payment for land takings, it cannot rightfully be inferred that the Legislature intended to permit payment for land takings from a fund appropriated by a particular Item.

NOVEMBER 24, 1965.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission*.

DEAR COMMISSIONER WHITMORE:—You have requested my opinion on whether it is permissible to pay from funds appropriated by Item 8260-81 of § 2 of c. 604 of the Acts of 1959, as amended, for the taking of certain real property by eminent domain. That item, as amended by § 3 of c. 544 of the Acts of 1961, provides:

"8260-81 For the construction of a pedestrian overpass on McGrath highway between Broadway and Pearl street in the city of Somerville. \$200,000.00"

Enclosed with your request for my opinion was a copy of a letter from the office of the Comptroller to you dated August 27, 1965, which stated in part:

"We are returning Schedule #965 dated August 24, 1965 payable to Isabel C. Harding in the amount of \$13,251.96 and City of Somerville for \$447.30.

"Land taking does not appear to be a proper charge to appropriation no. 8260-81."

The issue presented is whether an appropriation for the "construction" of a public improvement makes available those funds necessary to pay damages for the taking by eminent domain of land essential to such "construction." There is no sound basis upon which to question the

authority of the Metropolitan District Commission to take the subject property by eminent domain. That authority has been delegated to the Commission by c. 92 of the General Laws and various Highway Bond Issue Statutes.

It is my opinion that payment for land takings from said Item 8260-81 is not permissible. Item 2900-45 of said § 3 of c. 544 of the Acts of 1961 provides, *inter alia*:

“For the acquisition of land for a site for a highway administration building in district two by purchase or by eminent domain under chapter seventy-nine of the General Laws, and for the construction of highway administration buildings in districts two and six. . . . \$1,100,000.”

Said Item 2900-46 includes an explicit statement of authority to pay for land takings from the funds it appropriates. Item 8260-81 was amended by the same § 3 of c. 544, Acts of 1961. Unlike Item 2900-46, Item 8260-81 contains no specific language allowing payment therefrom for land takings. The General Court could easily have inserted such language into Item 8260-81. In the absence of such language, it must be inferred that the Legislature did not intend to permit payment from that item for land takings.

You further ask, if funds are not available under St. 1959, c. 604, whether owners of the property involved may be compensated from the Highway Fund. Section 34 of c. 90 of the General Laws establishes the Highway Fund. It provides, *inter alia*:

“Said Highway Fund, subject to appropriation shall be used as follows:

“(2) (g) For expenditure, under the direction of the metropolitan district commission, to meet the cost of maintenance of boulevards in the metropolitan parks district . . . and the commonwealth’s share of the cost of construction of boulevards within said district now or hereafter authorized. . . .”

It is clear that payment for land takings from this subsection of the highway fund is not permissible. It contains no reference to payment for land takings. There does not appear to be any valid reason to include by implication the power to pay for land takings.

However, an appropriation is available from which the owners of the land taken may be paid. I call your attention to § 4 of c. 822, Acts of 1963, which provides:

“Pursuant to the provisions of section one, the [metropolitan district] commission is hereby authorized and directed to expend a sum, not to exceed ten million dollars, for projects of the commission in the area set forth in the “Master Highway Plan for the Boston Metropolitan Area,” as established and defined in Exhibit B of House Document No. 1767 of the year nineteen hundred and forty-eight.”

A pedestrian overpass on McGrath highway in Somerville is clearly a project of the Metropolitan District Commission in the area defined in

the Master Highway Plan for the Boston Metropolitan Area as required by said § 4, c. 822, Acts of 1963.

Accordingly, it is my opinion that the owners involved may be compensated from funds available under c. 822 of the Acts of 1963.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

A person who has not established tenure and is serving at the pleasure of an appointing authority may be discharged at any time without notice or hearing.

A person who is entitled to the protection guaranteed by G. L. c. 30, § 9A, may be discharged, for cause, after proper notice, hearing and opportunity for review in accordance with c. 31, §§ 43 and 45, M.G.L. It would appear to be within the sound discretion of the appointing authority to determine, on the basis of the facts of a given case, whether a Superior Court conviction warrants such a discharge.

NOVEMBER 24, 1965.

HON. THEODORE W. SCHULENBERG, *Commissioner, Department of Commerce and Development.*

DEAR SIR:—I am in receipt of your request for my opinion with regard to your authority to discharge two employees of your department who have been convicted of criminal charges and who have appealed their convictions to the Supreme Judicial Court.

You state that one of the convicted employees—Mr. James F. Reynolds—is presently under suspension pursuant to the provisions of § 59 of c. 30 of the General Laws, the so-called Perry Law. (See my opinion rendered to you on July 23, 1965.) It is a matter of record that Mr. Reynolds is entitled to the protection guaranteed by G. L. c. 30, § 9A, which states:

“A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office . . . , and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. . . .”

It is my opinion that Mr. Reynolds may be discharged after proper notice, hearing and opportunity for review in accordance with §§ 43 and 45 of c. 31. Sufficient cause for discharge would normally be provided by a Superior Court conviction on criminal charges. It is not necessary to delay the discharge until all possible avenues of appeal have been exhausted. Although it is the general purpose of the civil service law to establish job security for public employees, the protection furnished

thereby is not absolute. Section 43 of c. 31 states that an employee may be removed only for "just cause"; it is readily apparent that "just cause" may arise when an employee of the Commonwealth has been convicted on criminal charges and accordingly has destroyed public confidence in his continued efficient functioning. It would appear to be within the sound discretion of the appointing authority to determine, on the basis of the facts of a given case, whether a Superior Court conviction warrants such a discharge.

The other convicted employee of the Department of Commerce and Development to whom you have referred is Mr. Michael J. Favulli. You have informed me that Mr. Favulli was appointed, effective January 4, 1963, by the then Commissioner of Commerce, John F. Burke, as a "special representative." At the time Mr. Favulli was appointed, he was considered an expert within the meaning of G. L. c. 23A, § 4 as it then read. That section provided in part:

"The commissioner may appoint such experts as the department may require who shall not be subject to chapter thirty-one or section nine A of chapter 30. . . ."

Neither at the time of his appointment, nor at any subsequent time, did Mr. Favulli gain tenure in his position. He served at the pleasure of the Commissioner of Commerce.

By c. 636 of the Acts of 1964, the General Court reorganized the Department of Commerce to form a new Department of Commerce and Development. Section 15 of that chapter provides:

"Upon the effective date of this section all permanent and temporary positions in any board, agency, division, bureau, section or other administrative unit under the department of commerce . . . shall be transferred to the department of commerce and development established under the provisions of chapter twenty-three A of the General Laws, inserted by section one of this act, and any such position not then classified under chapter thirty-one of the General Laws . . . shall be so classified. . . ."

[Certain exceptions are not material.]

Section 15 is modified, however, by the provisions of § 18:

"Upon the effective date of this section all officers or employees of any board, agency, division, bureau, section or other administrative unit under the department of commerce . . . who immediately prior thereto did not have tenure under section nine A of chapter thirty or section twenty-six S of chapter one hundred and twenty-one of the General Laws in a position allocated to job groups eighteen or above in the salary schedules set forth in sections forty-six and forty-six B of chapter thirty of the General Laws which, pursuant to section fifteen of this act, shall be transferred to the department of commerce and development established under the provisions of chapter twenty-three A of the General Laws, inserted by section one of this act, and shall be classified under chapter thirty-one of the General Laws, are hereby transferred to the service of said department without impairment of seniority or retirement rights, and without reduction in compensation or salary

grade; provided, however, that nothing in this section shall be construed to confer upon any officer or employee any rights not held prior to such transfer or to prohibit any subsequent reduction in compensation or salary grade if such were not prohibited prior to the transfer; and provided, further, however, that upon the occurrence of any vacancy in any position held by an officer or employee subject to this section, any appointment to fill such vacancy shall be made in accordance with chapter thirty-one of the General Laws and the rules and regulations made thereunder. . . ." [Emphasis supplied.]

Although § 15 requires that practically all permanent and temporary positions in the new department are to be classified under G. L. c. 31, and although a portion of § 18 directs that all officers and employees in a job group of eighteen or above who do not have tenure shall be transferred from the old Department of Commerce to the new Department of Commerce and Development without impairment of seniority and other rights, the proviso clause of § 18 specifically negates the possibility that any officer or employee may receive a permanent status which he did not previously possess. Although the position has become classified, the present incumbent enjoys only the rights which were his prior to the reorganization.

In view of your statement that prior to the reorganization of the Department of Commerce Mr. Favulli was employed without tenure in a job group classification of 21P, it is my opinion that the proviso clause of § 18 of c. 636 of the Acts of 1964 prevented him from obtaining tenure at the time of the reorganization. Inasmuch as no provision of law has ever established tenure for Mr. Favulli, I must conclude that he is serving in his present position at the pleasure of the Commissioner of the Department of Commerce and Development. It is, therefore, my opinion that Mr. Favulli may be discharged by the Commissioner at any time without notice or hearing.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Employees in the Division of State Colleges itself are not exempted from the civil service laws.

Paragraphs A and B of § 15 of c. 31, M.G.L., have no application to persons employed at the state colleges subsequent to the effective date of c. 572, Acts of 1965.

A civil service employee must, if he wishes to protect his right to return to his permanent position, obtain a leave of absence therefrom, before accepting promotions to a higher position in a state college.

NOVEMBER 29, 1965.

HON. W. HENRY FINNEGAN, *Director of Civil Service*.

DEAR SIR:—I am in receipt of your request for my opinion concerning the proper interpretation of c. 572 of the Acts of 1965 as it relates to

employment practices in state colleges and in the Division of State Colleges.

Section 45 of c. 572 of the Acts of 1965 provides as follows:

"Nothing in this act shall be construed to impair the seniority, tenure, retirement or other rights of any permanent civil service employee, or veteran covered by section nine A of chapter thirty of the General Laws, or of any maintenance employees covered by section nine B of said chapter thirty, employed on the effective date of this act in the department of education and by the state colleges; provided, however, that to staff the said department and the state colleges as reorganized by this act, any such employee may be transferred to any position in his respective employing unit as so reorganized; provided further, however, (a) that the employee's salary shall not be reduced as the result of such a transfer; (b) that without the approval of the director of civil service and the director of personnel and standardization the employee shall not, as the result of such a transfer, be placed in a position of higher salary grade; and (c) that the applicable provisions of chapters thirty and thirty-one of the General Laws shall not apply to *persons employed at the state colleges* subsequent to the effective date of this act. [Emphasis supplied.]

Part (c) of the proviso clause specifically exempts from the coverage of cc. 30 and 31 "persons employed at the state colleges subsequent to the effective date of this act." By this provision, the General Court apparently sought to establish employment practices at the state colleges which would more closely resemble the practices at private institutions, as opposed to the ordinary civil service appointment procedure which exists in most other branches of the public service.

You have asked specifically whether employees in the Division of State Colleges itself are now to be exempt from the civil service laws. It is my opinion that these employees are not exempted. They serve in an administrative unit which is separate from the individual colleges. The Division itself does not perform a direct educational function, and therefore the rationale for having an employment program independent of the civil service system is not applicable. [For a more complete discussion of this question, see my opinion of November 22, 1965, to the Director of the Division of State Colleges, a copy of which is enclosed.]

In addition, you have asked whether permanent civil service employees of the department of education may qualify for promotion to higher positions under the provisions of G. L. c. 31, § 15, paragraphs A and B.

It is my opinion that paragraphs A and B of § 15 of c. 31 have no application to persons employed at the state colleges subsequent to the effective date of c. 572. Paragraph A states in part:

"An appointing authority, with the approval of the director, may promote in the same department or division of a department in the official service a permanent employee in one grade to the next higher grade as determined by the director. . . ."

The purpose of this paragraph is to permit an appointing authority to

promote an employee to a higher position in the civil service without opening the higher position to a competitive examination. By this procedure, the General Court intended to favor career civil servants by granting them promotion preference at the option of the appointing authority. This preference becomes meaningless, however, when the higher position may be filled by the appointing authority without regard to the civil service laws. Inasmuch as § 45 of c. 572 of the Acts of 1965 permits an appointing authority to hire new employees without regard to their civil service status, there is no longer any value in the preference accorded career civil servants by paragraph A of § 15 of c. 31 of the General Laws. The provisions of that paragraph will therefore no longer be applicable to civil service employees who occupy positions in the state colleges.

Paragraph B of § 15 of c. 31 is also inapplicable to promotions of state college employees. It provides in part that:

“Except as authorized in paragraph A, and except as otherwise provided in section twenty, all promotions in the official service shall be made after a competitive promotional examination. . . .”

Inasmuch as any position to which a permanent employee might be promoted could also—pursuant to St. 1965, c. 572, § 45—be filled by non-civil service personnel, a civil service employee seeking such a position could hardly be benefited by the provisions of the paragraph above. It was certainly not the intention of the General Court to permit the appointment of a person without civil service status while simultaneously imposing a competitive examination upon any permanent employee who might desire the same position. Paragraphs A and B of § 15 of c. 31 are clearly inconsistent with the express desire of the General Court to have positions in the state colleges relieved of the requirements of the civil service law, and accordingly I advise you that these provisions are no longer applicable to such positions.

You further ask whether a civil service employee who is appointed to a higher position in a state college will still retain the right to return to the permanent position which he held on the effective date of c. 572 of the Acts of 1965.

It must be concluded that such an employee who accepts a higher position will thereby lose all rights which he held in the previous position under cc. 30 and 31 of the General Laws, unless he has protected his civil service tenure by obtaining a leave of absence from his permanent position. As indicated above, § 45 of c. 572 of the Acts of 1965 shows a clear legislative intent that positions in the state colleges should not be subject to the civil service laws. As a limited exception to this general rule, the Legislature provided that present employees having rights under the civil service laws would continue to possess those rights after the reorganization effected by c. 572. By this exception the Legislature sought only to guarantee that no civil service employee would suffer any loss of employment standing as a result of the reorganization. The General Court did not intend that an employee should gain the additional right to resign from his permanent position and yet retain the option to return to that position whenever he might wish. Normally, an

employee must obtain a leave of absence from his permanent position if he wishes to be able to return to it after a period of employment elsewhere. A civil service employee must—if he wishes to protect his right to return to his permanent position—obtain such a leave before accepting promotion to a higher position in a state college. Should he fail to do so, he will—in my opinion—lose the employment protection vested in him pursuant to cc. 30 and 31 of the General Laws.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A law which is unambiguous in its language must be given effect as it is written without addition or extrapolation.

The Board of Standards is limited to establishing standards for door locks only, and is not authorized to regulate the design of doors or other matters.

DECEMBER 1, 1965.

HON. GEORGE W. Waters, *Chairman, Board of Standards, Department of Public Safety*.

DEAR SIR:—I am in receipt of your request for my opinion concerning the proper interpretation of c. 464 of the Acts of 1965. That enactment requires any apartment house having more than three units to be equipped with an outer door which will close and lock automatically with a “lock of a type approved by the board of standards in the department [of Public Safety].” You ask for my opinion “as to the scope of [your] responsibility under this act; i.e., whether it includes the design of the door, the butts, the self-closing device and the lock, or just the lock itself.”

Chapter 464 of the Acts of 1965 is clear and direct in its language. It states:

“At least one of the doors of the main common entry way into every apartment house having more than three apartments shall be so designed or equipped as to close and lock automatically with a lock of a type approved by the board of standards in the department [of public safety]. . . .”

This Act becomes effective on January 1, 1966.

The statute contains no indication that the General Court intended the Board of Standards to concern itself with any part of the apartment door other than the actual locking device. Approval by the Board of Standards is related in St. 1965, c. 464 solely to the type of lock. A law which is unambiguous in its language must be given effect as it is written without addition or extrapolation. Although the security of a dwelling might well be affected by the design of a door or by some other element other than the lock itself, the specific language of the statute does not warrant the inclusion of architectural details of apartment house doors within the authority of the Board.

In light of the language and effect of c. 464, it is my opinion that the

Board of Standards is limited to establishing standards for door locks only, and would not be authorized to regulate the design of doors or other matters. For example, it would be proper for the Board to set standards for the closing devices which insure that a door will lock after each use, but it would not be proper for the Board to prescribe the dimensions or materials of the door itself. The mandate of the General Court is restricted to the actual locking device itself, and this specific direction should not be extended by interpretation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Chapter 740 of the Acts of 1964 was not intended to abolish the power of the Executive Council to decide appeals from decisions of the Commissioner of Veterans' Services under the provisions of c. 115, § 2, M.G.L. Such appeals are to be processed as before the passage of chapter 740.

DECEMBER 6, 1965.

HON. KEESLER H. Montgomery, *Executive Secretary, Governor's Council*.

DEAR SIR:—I am in receipt of your request for my opinion as to whether c. 740 of the Acts of 1964 alters the authority of the Executive Council to consider appeals from decisions of the Commissioner of Veterans' Services rendered under c. 115, § 2, of the General Laws.

Section 2 of c. 115 provides in part:

"... A final appeal from such decision or determination may be taken by such claimant, veterans' agent or resident, within ten days after his receipt of notice of the same, to the governor and council. The committee of the council to which any such appeal is referred shall, if requested, hold a public hearing thereon and make a report of its recommendations in writing to the governor and council. . . ."

A careful examination of c. 740 of the Acts of 1964 reveals no specific reference to the power of the Governor and Council to hear appeals from decisions of the Commissioner of Veterans' Services. Any possible repeal of this power must be inferred from the general language of c. 740. The only portion of that chapter which might refer obliquely to the power to hear appeals is § 4, which states:

"Subject to section two of this act and except as required by the constitution of the commonwealth, so much of each provision of the General Laws and of any special law as requires the advice and consent of the council with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department, including without limitation, any deposit, borrowing, loan, investment, endorsement, validation, surety or bond, or any lease, license, purchase, acquisition, sale, conveyance, disposition or transfer, or any contract or other agreement, or any permit or license, or any rules or regulations, is hereby repealed."

The question which must be decided here is whether the provision for

appeals from the Commissioner of Veterans' Services constitutes a requirement of "the advice and consent of the council with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department."

The duty of the Executive Council to act as an appeal board does not involve "advice and consent" either as those terms are generally understood or as they are defined in St. 1964, c. 740, § 1. The power to decide appeals is quasi-judicial in its nature and is separate and independent. It is fundamentally different from the cooperative and dependent powers which the Executive Council ordinarily exercises (or did exercise before the passage of c. 740). Acting as the final arbiter of a dispute between two parties is not generally regarded in the same category as confirming appointments or approving contracts, acquisitions, or other actions of the executive branch of the state government.

The failure of c. 740 to provide an alternative appeal procedure is a further indication that § 4 of that act was not intended to repeal the provisions of c. 115, § 2, of the General Laws. A difficult situation would arise if the appeal powers of the Executive Council were simply eliminated. The Governor himself would then be obliged to consider all appeals from the Commissioner of Veterans' Services without the aid of any other officer or body. I do not believe that it was the purpose of St. 1964, c. 740 to impose *greater* burdens upon the Chief Executive, especially in areas in which there may well be investigatory and quasi-judicial problems.

Accordingly, it is my opinion, based on the factors outlined above, that c. 740 of the Acts of 1964 was not intended to abolish the power of the Executive Council to decide appeals from decisions of the Commissioner of Veterans' Services under the provisions of c. 115, § 2 of the General Laws. Such appeals should, therefore, be processed in the same fashion as before the passage of c. 740.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Generally, administrative agencies may interpret and construe only statutes and ordinances within the area of their technical competence.

An appeal prosecuted by a person who is not a "party aggrieved," within the purview of G. L. c. 111, § 150A, should be dismissed.

DECEMBER 8, 1965.

HON. ALFRED L. FRECHETTE, *Commissioner of Public Health*.

DEAR COMMISSIONER FRECHETTE:—In your letter of December 7, 1965, clarifying your earlier letter of November 23, 1965, you state that you are considering an appeal under G. L. c. 111, § 150A from a party claiming to be aggrieved by the assignment of a dump site in the City of Woburn. The site was assigned by the Woburn Board of Health. G. L. c. 111, § 150A. The appellant is a resident of Woburn "and has a contract with the City . . . to operate a dump for disposal of its solid waste on

land belonging to the [appellant].” Because of “a disagreement as to the interpretation of the contract the City has assumed the responsibility of disposing of its solid waste” on the land whose assignment is the subject of the present appeal.

The sole bases of the appellant’s complaint are that the assignment violates the zoning laws and that the Board of Health failed to obtain a permit from the City Council. The appellant “does not allege that his health, comfort or convenience is adversely affected.” Presumably, there is no allegation that the appellant is in any way aggrieved (except through his interest as the owner of another dump site) by the zoning violation or the failure to obtain a permit of which he complains.

On these facts, you request my answer to two questions:

1. Is the appellant a “party aggrieved” within the purview of G. L. c. 111, § 150A?
2. If the appellant is not a “person aggrieved” what should be the disposition of the appeal?

My answer to the first question is “No.” It would appear that the primary question for the determination of the Department of Public Health in appeals under G. L. c. 111, § 150A is whether an assignment “results in a nuisance and a danger to the public health.” This type of question is obviously within the general competence of the Department to decide. G. L. c. 17, § 1 *et seq.* Generally, administrative agencies may interpret and construe only statutes and ordinances within the area of their technical competence. *Norwood Heights Imp. Assn. v. City Council of Baltimore*, 195 Md. 1, 7-8.

Because of the unusual provisions of St. 1955, c. 310, § 3 (section 1 of c. 310 inserted c. 111, § 150A into the General Laws), it may be that in certain cases the Department has jurisdiction to construe and enforce rights under a zoning ordinance with regard to the location of dumps. (See 1957 Report of the Attorney General p. 94). It is not necessary on the facts that you present to determine the circumstances, if any, in which such question would be properly before you.

Where alleged violation of a zoning ordinance affects the appellant only as a business competitor and a resident of the city, he would not even have standing to seek direct enforcement of this ordinance in a court of general jurisdiction. *Circle Lounge & Grille Co. v. Board of Appeal of Boston*, 324 Mass. 427, 430. *Boyle v. Building Inspector of Malden*, 327 Mass. 564, 566-567. *O'Donnell v. Board of Appeals of Billerica*, 1965 Mass. Adv. Sh. 919, 921. See *Nantucket Boat, Inc. v. Woods Hole, Martha's Vineyard & Nantucket SS Authy.*, 345 Mass. 551, 554 *Cleary v. Licensing Commn. of Cambridge*, 345 Mass. 257, 259. I deem it an *a fortiori* proposition that such a person has no standing to seek such enforcement before an administrative agency that is not generally expected to exercise any special competence in zoning problems. Moreover, on the basis of the foregoing rationale, it is equally clear that the appellant lacks standing to raise before the Department any question based on the alleged failure of the Woburn Board of Health “to obtain a permit from the City Council.” *Cleary v. Licensing Commn. of Cambridge*, *supra*.

Where an appeal is prosecuted in a court by a person without standing, it is customary to dismiss the appeal. *New England Merchants Natl. Bank of Boston v. The First Church in Swampscott* (Congregational), 346 Mass. 780, 781 and cases cited. Accordingly, it is my opinion that the disposition in this case should be "Appeal Dismissed."

Very truly yours,

EDWARD W. BROCKE, *Attorney General*.

The status of the War Memorial Auditorium, as a municipal project, does not, in and of itself, prohibit its being granted a license to dispense alcoholic beverages for sale. Should the Auditorium Commission decide that alcohol should be dispensed on the Auditorium premises, the Commission may lawfully proceed to secure the necessary facilities and personnel.

Should the appropriate administrative authorities find that the application is proper, and should they determine that favorable action is warranted, participation by the city of Boston creates no legal impediment to the granting of the license.

DECEMBER 17, 1965.

HON. QUINTIN J. CRISTY, *Chairman, Alcoholic Beverages Control Commission*.

DEAR MR. CRISTY:—You have requested my opinion with regard to an application for transfer of a seven-day all alcoholic beverages Common Victualer license presently awaiting action by your Commission. You have informed me that the application in question has been filed by one Harry Olins, Trustee in Bankruptcy of 660 Beacon Street, Inc., for transfer of its license from 660 Beacon Street, Boston, to 900 Boylston Street, Boston, the War Memorial Auditorium. The petition also seeks transfer of ownership of the license from 660 Beacon Street, Inc., to Hub Catering, Inc., Lee Fields, Manager.

The Licensing Board of the City of Boston has not acted upon this application; rather, the Board has informed your Commission that it has been unable to reach a final conclusion as a result of uncertainties of a legal nature. Accordingly, you have posed the following questions:

"In the absence of special legislation to the contrary, we ask your good office to advise whether or not the law will allow a municipally owned and operated Auditorium, through an independent contractor, to dispense alcoholic beverages for sale where the profits from which are shared by the municipality and the private independent contractor.

"If your answer should be in the affirmative, would this then in effect be permitting the municipality to engage in the business of dispensing alcoholic beverages for sale?"

There can be no doubt that the War Memorial Auditorium—the location to which the license in question is sought to be transferred—has been constructed and is currently managed by a Commission which is public in nature. Construction of a municipal auditorium in the City of

Boston was authorized by the General Court in 1954, by c. 164 of the Acts of that year. Pursuant to this authorization, the City of Boston created a board to be known as the Auditorium Commission, the members to be appointed by the Mayor. The Commission is clearly an agency of the City of Boston, and the Auditorium itself is a public project of the municipality.

The status of the War Memorial Auditorium as a municipal project, however, does not—in and of itself—prohibit the license transfer which is contemplated. The Act of the Legislature which authorized construction of the Auditorium (St. 1954, c. 164) specifically provided that the structure was to include “an exhibition hall, assembly hall and accessory rooms suitable for exhibitions, conventions and other shows and gatherings in said city (of Boston).” Although the dispensing of alcohol may not be crucial to the success of such events, it could reasonably be determined that its availability might be desirable. Certainly, such a determination would be well within the discretion of the Auditorium Commissioners.

Should the Auditorium Commission decide that alcohol should be dispensed on the Auditorium premises, it is my opinion that the Commission may lawfully proceed to secure the necessary facilities and personnel. The authority of the Commission extends beyond the construction of the building to the care and management of the project. It has been clearly provided that the Commission “shall contract for the care and management thereof after its completion; and for such purposes may, subject to the approval of the mayor, make such contracts and employ such experts, assistants and employees as they may think necessary or expedient.” [See City of Boston Ord. 1957, c. 2.] The Commission may—as part of its responsibility to manage the Auditorium—determine that alcohol is to be sold on the premises and make necessary arrangements with regard to such sale.

The fact that profits from such sales will be shared by the Commission (in effect, the municipality) and an independent contractor who is actually in charge of the selling operation does not mean that the City of Boston is itself engaging in the business of dispensing alcoholic beverages. The Auditorium Commissioners may well prefer to contract with the vendor on the basis of percentages rather than on the basis of a set fee. This is a common practice which is followed by a multitude of halls, hotels and other public places, and cannot in any practical sense be said to constitute a real participation in the sale of alcoholic beverages on the part of the City of Boston. The City is simply a landlord; the business is conducted wholly by a vendor licensed under the provisions of G. L. c. 138 and responsible for observance of all relevant statutes and regulations. [Should the facts be such that the City actually did become an unlicensed vendor, the legal implications would, of course, change; but your request does not indicate this to be the case.]

Accordingly, I find nothing which would prevent the licensing of a dispenser of alcoholic beverages at the location in question merely on the basis of the municipal nature of the premises. The application and petition of Harry Olins, Trustee, should be acted upon by the local licensing board and by your Commission pursuant to G. L. c. 138, § 23

and other relevant provisions of law. Should the appropriate administrative authorities find that the application is proper and should they determine that favorable action is warranted, participation by the City of Boston to the extent discussed above creates no legal impediment to the granting of the requested transfer.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Article LXV of the Amendments to the Constitution of the Commonwealth prohibits acceptance by a present member of the Legislature of appointment to one of the new positions on the enlarged Advisory Council on Education.

Upon the enactment of H 4385 the membership of the Advisory Council will be immediately expanded to a total of fifteen persons, and that ten of such persons must vote to approve the list of nominees for appointment to the Board of Higher Education and the Board of Trustees of State Colleges.

DECEMBER 21, 1965.

HIS EXCELLENCY, JOHN A. VOLPE, *Governor of the Commonwealth*.

DEAR GOVERNOR VOLPE:—You have requested my opinion with regard to the interpretation of G. L. c. 15, § 1H, as inserted by c. 572 of the Acts of 1965 (“An Act to improve and extend educational facilities in the Commonwealth”), and the effect of H. 4385, an amendment to this section recently passed to be enacted and now awaiting Executive action. General Laws c. 15, § 1H provided, in its original form, for an Advisory Council on Education consisting of nine residents of the Commonwealth to be appointed by the Governor. The section further provided that no member of the Council “shall be employed by or derive regular compensation from any educational institution, or school system, public or private, in the commonwealth or be employed by or derive regular compensation from the commonwealth, or be a member of a board of any public institution for higher education in the commonwealth or of any state board of education . . .”

Included among the responsibilities of the Advisory Council is the making of recommendations to the Governor for appointments to certain boards of education of the Commonwealth.

“The council shall submit to the governor for his consideration for appointment to the board of higher education, the board of education, and the board of trustees of state colleges lists containing the names of three times as many qualified residents of the commonwealth as there are appointments to be made to such boards. *Each such list shall be approved by a two-thirds vote of all the members of the council.*” [Emphasis supplied.]

Mass. G. L. c. 15, § 1H.

I gather from your inquiry that the Advisory Council as presently

constituted (prior to the appointment of the six additional members which would be authorized by enactment of H. 4385) is now prepared to submit recommendations pursuant to the language quoted above.

House 4385 would, if enacted, expand the membership of the Advisory Council from nine to fifteen; furthermore, it would qualify the prohibition against appointment of persons receiving regular compensation from the Commonwealth. ["No member of the council shall . . . be employed by or derive regular compensation from the commonwealth *expressly excluding members of the general court* . . ."] [Emphasis supplied.]

Accordingly, you have posed the following two questions:

"1. In view of Article LXV of the Amendments to the Constitution of the Commonwealth, may a present member of the General Court be appointed to one of the new positions on the enlarged Advisory Council?

"2. Pending the appointment of additional members (whether or not legislators) to the Advisory Council as enlarged by H. 4385, is the approval of two-thirds of the present nine members sufficient for purposes of submission to me of the lists of nominees to the Board of Higher Education, and the Board of Trustees of State Colleges provided for in Section 1H of Chapter 15 of the General Laws?"

Article LXV of the Amendments to the Constitution of this Commonwealth imposes a specific prohibition upon the acceptance of certain positions in the public service by members of the General Court.

"No person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term, nor receive additional salary or compensation for service upon any recess committee or commission except a committee appointed to examine a general revision of the statutes of the commonwealth when submitted to the general court for adoption."

Const. of the Comm., Amends., Art. LXV

Thus a legislator may not lawfully occupy a position during the term of the General Court in which such position has been created, or in which the compensation payable for service in the position has been increased. For a recent application of this principle by the Supreme Judicial Court, see *Opinion of the Justices*, 1964 Mass. Adv. Sh. 1201, involving the office of Registrar of Motor Vehicles.

It cannot be disputed that membership on the Advisory Council on Education represents more than mere employment by the Commonwealth. Such membership constitutes the holding of an "office," and the provisions of Article LXV of the Amendments clearly apply. This session of the General Court has—by the passage of H. 4385—authorized the creation of six additional offices in the government of the Commonwealth. I am aware that adoption of this measure by the Legislature could conceivably be viewed simply as alteration of a single existing office. But such an approach would in my opinion improperly conflict with the spirit and objective of Article LXV.

"The obvious purpose of this statute is to remove from a member of

the Legislature any temptation to be influenced in his vote by reason of the possibility that he may be a candidate for the place created by the Legislature of which he is a member."

I. Op. Atty. Gen. p. 347.

The General Court has, from a practical point of view, made available new positions to which—were it not for Article LXV—its own members might be appointed. It is my opinion, therefore, in response to your first question, that Article LXV prohibits acceptance by a present member of the Legislature of appointment to one of the new positions on the enlarged Advisory Council. This limitation does not, however, under the language of Article LXV, extend beyond the present term of the members of the General Court. (for similar views of the effect of Article LXV, see III Op. Atty. Gen. p. 118; IV Op. Atty. Gen. p. 238.)

You have asked in addition whether a vote of two-thirds of the present nine members will be sufficient for submission of the lists of nominees required by G. L. c. 15, § 1H. Should H. 4385 be enacted, c. 15, § 1H will provide: "There is hereby established an advisory council on education. Said council shall consist of *fifteen* persons. . . ." [Emphasis supplied.] The original provision containing a reference to a nine-member council will have been stricken, and no authority for a body with such a membership will exist. Furthermore, use of an emergency preamble by the Legislature is an additional indication that the General Court intended the Advisory Council to function with fifteen members without delay. Section 1H specifically provides that the lists of nominees shall be approved by a two-thirds vote of *all* of the members of the Council prior to submission to the Governor. Clear language of this nature cannot be varied by interpretation. It is my opinion that upon the enactment of H. 4385 the membership of the Advisory Council on Education will be immediately expanded to a total of fifteen persons, and that ten of such persons must vote to approve the lists of nominees for appointment to the Board of Higher Education and the Board of Trustees of State Colleges.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The amendment to contract No. 11081 between the Department of Public Works and the Springfield Redevelopment Authority relative to relocation assistance properly falls within the duties of the Department of Public Works under § 8B of c. 79 of the General Laws.

Proposed rules submitted by the Department of Public Works fall within the purview of the statutory authority of that department.

DECEMBER 29, 1965.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works*.

DEAR COMMISSIONER SARGENT:—You have requested my opinion on the following questions:

(1) Does the amendment to Contract No. 11081, appended to your

letter, properly fall within the duties of the Department of Public Works under Section 8B of Chapter 79 or any other provision of the General Laws?

(2) Do the proposed rules of procedure, attached to your letter, properly comply with the authority of the Department referred to in question 1?

Contract No. 11081 is an agreement between the Department of Public Works and the Springfield Redevelopment Authority relative to relocation assistance. The amendment referred to in question 1 above provides for certain limited management services to be provided by your Department with reference to the structures involved. It is understood that the purpose of this amendment is to remedy the situation in which the former landlords have divested themselves of any responsibility for maintenance of structures taken even though tenants continue to occupy the premises for the four months allowed in section 8B of Chapter 79 of the General Laws.

It is my opinion that the amendment to Contract No. 11081 properly falls within the duties of the Department of Public Works under section 8B of Chapter 79 of the General Laws.

Chapter 111, section 5, of the General Laws, as amended by Chapter 390, of the Acts of 1963 provides for standards of fitness for dwelling places, and further provides for the enforcement of the law relative to minimum housing standards. Said Chapter 390 reads as follows:

"Section 5 of chapter 111 of the General Laws is hereby amended by striking out the paragraph inserted by section 1 of chapter 172 of the acts of 1960 and inserting in place thereof the following two paragraphs:

"Said code may provide for the demolition, removal, repair or cleaning by local boards of health of any structure which so fails to comply with the standards of fitness for human habitation or other regulations in said code as to endanger or materially impair the health or well-being of the public. Upon a determination by the board of health, after examination as provided in said code, that a building, tenement, room, cellar, mobile dwelling place or any other structure (a) is unfit for human habitation, (b) is or may become a nuisance, or (c) is or may be a cause of sickness or home accident to the occupants or to the public, it may issue a written order to the owner or occupant or any of them thereof, requiring the owner or occupant to vacate, to put the premises in a clean condition, or to comply with the regulations set forth in said code which are not being complied with or to comply with the rules and regulations adopted by the board of health as being necessary for the particular locality. The order shall be served in the same manner as is provided for the service of an order by section one hundred and twenty-four. A copy of such order shall be served upon any mortgagee of record by sending the same by registered mail, return receipt requested. If the owner or occupant refuses to comply with such order, the board of health may cause the premises to be properly cleaned at the expense of the owner or occupant, remove the occupant forcibly and close up the premises, or it may issue a written notice to the owner of such building, as appearing in the current records of the assessors of such town, setting forth the particulars of such

unfitness and requiring that the conditions be remedied. If the person so notified fails within a reasonable time to remedy the conditions thus set forth, the superior court on a petition in equity brought by the board of health, shall have jurisdiction, by injunction or otherwise, to enforce the requirements of the board of health. A copy of such written notice shall be served upon any mortgagee of record, by sending the same by registered mail, return receipt requested. Premises closed up under the provisions of this section shall not be occupied as a human habitation without written permission of the board of health. If within one year from the date the premises have been so closed up compliance with the regulations contained in said code has not been effected, the board of health may cause such structure to be demolished or removed, and a claim for the expense so incurred by said board shall constitute a debt due the city or town upon the completion of the work and the rendering of an account therefor to the owner of such structure, and shall be recoverable from such owner in an action of contract."

Your letter indicates "not only is the physical condition of the buildings involved grossly inadequate for human habitation, but there is a heavy tenancy in these buildings. . . ." You further indicate that in some cases the former landlord has failed to furnish to the tenants such items as water, heat and other utilities after the property is taken.

This would appear to be a clear violation of Chapter 111, section 5, as amended by Chapter 390 of the Acts of 1963. If the Department of Public Works were not able to remedy this situation within the authority of section 8B of Chapter 79 of the General Laws, there would be a conflict between said section and section 128B of Chapter 111. An act of the Legislature itself would thus result in the same hazard to the health and safety of the public which the General Court had attempted to remedy by other legislation.

"A statute is to be interpreted with reference to the pre-existing law. . . . If reasonably practicable, it is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. Statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there is some positive repugnance between them." *City of Everett v. City of Revere*, 344 Mass. 585.

These two statutes are not naturally repugnant to each other. If, however, the Department of Public Works were not allowed to correct this serious problem, such a repugnance might well arise. This would be contrary to the rule of statutory interpretation set forth in the above case.

Section 8B of Chapter 79 as most recently amended by St. 1965, Chapter 468 of the General Laws was clearly aimed at a problem existing at the time of its passage. Its aim was to remedy the situation in which the individual in possession of the property taken would not have sufficient time to secure proper living accommodations and would be forced to accept substandard housing. That the Legislature intended this to apply to tenants as well as owner-occupants is clear from the fact that the statute at its inception as House Bill 1760 pertained to "owners of

land" and before enactment was changed to refer to "person in possession of property." The 1965 amendment further expanded the section to include "tenant or lessee in possession."

It is presumed that the General Court intended to remedy the evil at which legislation appears to be aimed. See *Van Dresser v. Firlings*, 305 Mass. 51; *Friend Bros. v. Seaboard Surety Co.*, 316 Mass. 639; *Johnson's Case*, 318 Mass. 741. To deny the Department the right to amend the contract to remedy the problem would result in increasing the very evil which the Legislature apparently hoped to abolish. Such barrenness of accomplishment is not lightly to be imputed to the Legislature. See *Selectmen of Topsfield v. State Racing Comm.*, 324 Mass. 309.

After examining the proposed rules of procedure referred to in your letter, it is my opinion that they do fall within the purview of the statutory authority of the Department of Public Works.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Division of Industrial Accidents should continue to levy assessments for expenses against former self-insurers who originally established their status by posting surety bonds, and who, after ceasing to be self-insurers, have not complied with their statutory obligations.

DECEMBER 31, 1965.

HON. JAMES J. GAFFNEY, JR., *Chairman, Division of Industrial Accidents*.

DEAR SIR:—I am in receipt of your request for my opinion on the following question:

"Does a self-insurer whose license is obtained by furnishing a surety bond running to the Commonwealth under Mass., G. L., c. 152, Section 25A, sub-paragraph(b) of sub-section 2, and who subsequently ceases to be a self-insurer, and who fails after demand to deposit with the State Treasurer, an amount of securities equal to the penal sum of the bond or a single premium non-cancellable policy, or a guaranty bond *continue* subject to its proportionate assessment for such expenses as shall be determined annually by the Department of Administration and Finance to carry out the provisions of Chapter 152 relating to self-insurance, in accordance with the provisions of 25A, sub-section 4?"

Section 25A of c. 152 of the General Laws provides in part:

"[E]very employer shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner:—

* * * * *

"[b] By furnishing annually a bond running to the commonwealth, with some surety company . . . said bond, however, to be upon the condition that if the license of the principal shall be revoked or if the

principal shall cease to transact business in the commonwealth or if the division shall refuse to renew the license or if the principal shall insure with an insurer, the principal shall upon demand deposit with the state treasurer an amount of securities equal to the penal sum of the bond or a single premium non-cancellable policy issued by some insurance company authorized to transact the business of workmen's compensation insurance in this commonwealth, . . . or a bond executed as surety by some company authorized to transact the business aforesaid in this commonwealth, in an amount and form approved by the division, guaranteeing the payment of any liability on his part that may have arisen under this chapter. . . ."

Thus, by the terms of this section, a self-insurer must do one of three things when he ceases to be a self-insurer without at the same time taking out a regular policy with an insurance company. He must:

- (1) deposit securities;
- (2) take out a single-premium insurance policy, or
- (3) obtain a guaranty bond.

A separate portion of § 25A of c. 152 establishes a formula for apportioning the costs of the self-insurance program among the self-insurers themselves. Paragraph (4) provides that these expenses:

" . . . shall be assessed against all self-insurers, including for this purpose employers who have ceased to exercise the privilege of self-insurance but whose securities are retained on deposit in accordance with the rules of the division. The basis of the assessment shall be the proportion of such expense that the total securities deposited by each self-insurer or penal sum of bond or bonds furnished by each self-insurer at the close of each fiscal year bears to the total deposits and bonds of all self-insurers. . . ."

Whether a self-insurer establishes his status by depositing securities or by obtaining a surety bond, he is liable for a proportion of the expenses of administration. When a self-insurer who has established his status by obtaining a surety bond ceases to be a self-insurer, he will remain liable for a proportion of the expenses if he chooses to satisfy his remaining obligation by depositing securities. He will not remain liable if he obtains a single-premium insurance policy or if he obtains a guaranty bond.

The Division of Industrial Accidents makes an assessment in the former case but not in the latter, because the division continues to incur expenses of administration when a former self-insurer deposits securities, whereas when the former self-insurer obtains a single premium insurance policy or a guaranty bond the division is relieved of further administrative expenses.

In the situation described in the present question, the former self-insurer has refused to fulfill his obligation by any of the alternative means provided in the statute. Yet, although he has ceased to be a self-

insurer, he has not contracted with a workmen's compensation insurer or deposited a guaranty bond to assume the liability for outstanding claims, current and potential, which must still be incurred on his behalf.

To insure the protection of the Workmen's Compensation Law to injured employees of a self-insurer, such as is described in the instant situation, it should be noted that the surety bond running to the Commonwealth under the provisions of § 25A (2) (b) of c. 152, would be retained by the division under these circumstances until such self-insurer complied with the statutory requirements. That self-insurer is thus, in effect, primarily liable on its obligations incurred under the provisions of c. 152 up to the effective date of termination of its license as a self-insurer.

It was the intent of the General Court by enacting paragraph (4) of § 25A of c. 152, to require self-insurers themselves to bear the cost of the administrative expenses of the self-insurance program. It would be contrary to that intent for a former self-insurer to escape assessment for these expenses during a period in which he continues to benefit from the administrative services required to carry out the provisions of self-insurance. Until a former self-insurer has made other arrangements with an insurance or guaranty company, he should continue to be assessed for his proportion of the administrative expenses.

In rendering this opinion I am cognizant of a contrary opinion rendered by my predecessor, Robert T. Bushnell, on October 23, 1944. His opinion was based on the original § 25A of c. 152 of the General Laws enacted the previous year by c. 529, § 7 of the Acts of 1943. Subparagraph (b) of § 25A at that time did not permit a former self-insurer to satisfy his remaining obligations by obtaining a single-premium insurance policy or a guaranty bond. His only alternative when he ceased to be a self-insurer (without becoming an insured employer) was to comply with subparagraph (a), which then, as now, required the deposit of securities up to a certain market value. Thus, any former self-insurer who did not become an insured employer was obligated to leave securities on deposit with the division, regardless of whether he had originally become a self-insurer by complying with subparagraph (a) or with subparagraph (b). Therefore, the phrase "including for this purpose employers who have ceased to exercise the privilege of self-insurance but whose securities are retained on deposit in accordance with the rules of the division" should have been interpreted to include all former self-insurers who had not become insured employers, since under § 25A as originally enacted the only means by which such a former self-insurer could comply with the statute was by leaving securities on deposit with the Division of Industrial Accidents. Certainly, the General Court should not have been presumed to have intended that a former self-insurer should escape assessment for expenses because of his failure to deposit the required securities. It is my opinion that the views of my predecessor were based upon a mistaken interpretation of the purpose of the legislature in enacting paragraph (4) of § 25A of c. 152.

It is, therefore, my opinion that the Division of Industrial Accidents

should continue to levy assessments for expenses against former self-insurers who originally established their status by posting surety bonds, and who, after ceasing to be self-insurers, have not complied with their statutory obligations.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

Senate Bill No. 21 of the 1965 session of the General Court does not become law unless approved by the Governor within five business days after Friday, December 31, 1965.

JANUARY 7, 1966.

HIS EXCELLENCY, JOHN A. VOLPE, *Governor of the Commonwealth.*

DEAR SIR:—You have requested my opinion on the following question:

“I have before me Senate Bill No. 21 entitled ‘An act authorizing the construction and maintenance of structures bridging Newbury Street in the City of Boston.’ This bill was laid before me on Friday, December 31, 1965.

“Will you kindly advise me whether this bill will become law, or have force as such, if at the expiration of the five day period allowed me by the Constitution, I have taken no action on the bill.”

Ordinarily, if the Governor takes no action on a bill within five days after it is laid before him, the bill will become law. This result is required by the provisions of “Part the Second,” Chapter 1, Section 1, Article 2, of the Constitution of the Commonwealth of Massachusetts, which states:

“No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated; who shall enter the objections sent down by the governor, at large, on their records, and proceed to reconsider the said bill or resolve. But if after such reconsideration, two thirds of the said senate or house of representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two thirds of the members present, shall have the force of a law: but in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for, or against, the said bill or resolve, shall be entered upon the public records of the Commonwealth.

“And in order to prevent unnecessary delays, if any bill or resolve

shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law. . . ." [Emphasis supplied.]

Accordingly, in the usual course of events the Governor has five days in which to consider a given measure, after which time the bill will automatically become law in the absence of any action by him. In the present case, however, the Governor was unable to return the bill with his objections to the 1965 session of the Legislature after midnight on Tuesday, January 4, 1966, since the General Court was dissolved at that time under the provisions of Article X of the Amendments to the Constitution of the Commonwealth. Article X states:

"The political year shall begin on the first Wednesday of January instead of the last Wednesday of May, and the general court shall assemble every year on the said first Wednesday of January, and shall proceed at that session to make all the elections, and do all the other acts which are by the constitution required to be made and done at the session which has heretofore commenced on the last Wednesday of May. And the general court shall be dissolved on the day next preceding the first Wednesday of January, without any proclamation or other act of the governor. . . ."

Since the 1965 session of the General Court dissolved by operation of law less than five business days after Senate Bill No. 21 was presented to the Governor for his consideration, it is necessary now to consider the effect of the so-called "pocket veto" provision contained in Article I of the Amendments to the Massachusetts Constitution. Article I states:

"If any bill or resolve shall be objected to, and not approved by the governor; and if the general court shall adjourn within five days after the same shall have been laid before the governor for his approbation, and thereby prevent his returning it with his objections, as provided by the constitution, such bill or resolve shall not become a law, nor have force as such."

Two subsidiary questions must be considered in determining whether Senate Bill No. 21 will become law in the absence of any action by the Governor: (a) For the purposes of a "pocket veto" is the term "dissolved" (Amendment X) equivalent to "adjourn" (Amendment I)? (b) If the Governor does not wish Senate Bill No. 21 to become law, may he simply take no action, or must he refer the bill with his objections to the 1966 session of the Massachusetts Senate, which was required by Amendment X to assemble on Wednesday, January 5, 1966?

It is my opinion that under Amendment I the dissolution of the 1965 session of the General Court will have the same effect on pending legislation as would its adjournment. Any bill which has been presented to the Governor for his approval within five days prior to dissolution, and which he has not acted upon by the expiration of such five-day period, will be disposed of pursuant to Article I of the Amendments. This conclusion is required by the rationale which underlies that Article. While ordinarily a Governor who objects to a given measure must return

it to the Legislature with his objections, he cannot do so if the session of the General Court to which the bill should have been returned is no longer in existence. Article I of the Amendments reflects an apparent belief that it is preferable in certain cases to permit the Governor to exercise an absolute "veto" after the adjournment of the Legislature than to require him (if he disapproves a bill) to return it with his objections before adjournment, thus depriving him of the usual opportunity to consider proposed legislation for a full five days. Just as an adjournment of the Legislature may prevent the Governor from considering certain bills for a full five-day period, so also may its dissolution. Dissolution of the Legislature must—for the purposes of Article I of the Amendments—be considered simply an involuntary adjournment.

In answer to the second subsidiary question above, it is my opinion that the Governor cannot refer to the 1966 session of the General Court any bill which was presented to him by the 1965 session. The dissolution of the 1965 session on Tuesday, January 4, 1966, automatically terminated all legislative action by the General Court. All consideration of legislation must be begun anew by the 1966 session which assembled on Wednesday, January 5, 1966.

The language of Article X of the Amendments to the Massachusetts Constitution contemplates that the business of each annual session of the General Court is to be separate and distinct from that of each other session. That article was approved by the people and added to the Constitution on May 11, 1831, at a time when the members of the General Court were elected annually to serve one-year terms.

When the terms of members of the General Court were changed from one to two years by Article LXIV of the Amendments, effective with the 1920 elections, no corresponding alteration was made in Article X. Although subsequently in 1938 Article LXXII was adopted, such article, which provided for biennial sessions, was completely annulled in 1944 by Article LXXV, and is therefore of no present effect.

It is my opinion that, for the purposes of legislative action, each annual session must still be regarded as a distinct and separate unit. If action on a particular matter has not been completed by the end of the legislative year, that matter—if it is to be treated at all—must be considered *ab initio* in the following annual session.

In rendering my opinion on this subject, I am cognizant of the *Opinion of the Justices to the Senate and the House of Representatives*, reported at 291 Mass. 578. The Opinion concerned action by a joint session of the Legislature upon an initiative amendment under the provisions of Amendments, Article 48, Init., Part IV. The Court ruled that the legislative action required by the Constitution could lawfully be taken at the second as well as at the first session of the General Court, and remarked that the "official life of each branch of the General Court has been lengthened to two years instead of being limited to a single year, as it was before the adoption of art. 64 of the Amendments." [Page 586.]

The effect of this *Opinion of the Justices* must be limited to actions taken under Article 48 of the Amendments. Pursuant to such Article, certain matters must be considered by two different General

Courts, as opposed to two sessions of the same legislative body. Consequently, the Court concluded that the Legislature could freely decide to act upon such questions at either its first or its second session. This reasoning is entirely inapplicable to ordinary legislation, which originates in a given annual session. It has long been the custom of the General Court that ordinary legislative matters must be disposed of during the session in which they were introduced; and this approach is supported by the repeal of a constitutional Amendment which provided for biennial sessions. [See Amendments, Articles 72 and 75.]

It is important to distinguish between the legislative function performed by the General Court and the legislative function performed by the Governor. Although the authority of the General Court to consider a piece of 1965 legislation terminates on January 4, 1966, the authority of the Governor to approve or disapprove that piece of legislation continues in effect for a five-day period after the measure was first presented to him. Adjournment or other termination of a session of the General Court cannot reduce the period available for the Governor's consideration.

"The Legislature has no duties with respect to the act of the Governor in approving legislation. Bills which are signed are not to be returned. His act of approval, although a part of the legislative process, is performed by him alone. The Constitution allows for his consideration five days, a period which the Legislature has no power to shorten."

Opinion of the Justices, 334 Mass. 765, 770
Tuttle v. Boston, 215 Mass. 57, 59-60

The power to approve implies by necessity the power to disapprove. Accordingly, once the General Court has adjourned (voluntarily or otherwise), the power to disapprove by failure or refusal to act likewise becomes a power to be exercised by the Governor alone within the five-day period established by the Constitution. In light of the above discussion, and the conclusion reached upon the two subsidiary questions, it is my opinion that upon the facts stated in the present case, Senate Bill No. 21 of the 1965 session of the General Court does not become law unless approved by the Governor within five business days after Friday, December 31, 1965.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

A lease entered into on December 30, 1964, by the Metropolitan District Commission and the Family City Development Corporation is a valid exercise of the authority vested in the Metropolitan District Commission by G. L. c. 92, §§ 85 and 83.

JANUARY 10, 1966.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission.*

DEAR COMMISSIONER WHITMORE:—On September 29, 1965, you asked this Department to render a formal opinion with respect to the leasing of

certain land situated in South Boston near the William J. Day Boulevard, the said lease having been executed on December 30, 1964, by the Metropolitan District Commission and the Family City Development Corporation. Specifically, you have asked "whether or not the execution of said lease was within the authority of the Metropolitan District Commission."

By the terms of the instrument, the Commission leased approximately twenty-one thousand square feet of a parcel of land taken by it for park purposes in 1962 for a term of twenty-five years, with an option to renew the leasing arrangement for an additional twenty-five year period. Family City Development Corporation intends to use the leased strip for construction of an access road connecting the William J. Day Boulevard and a shopping center scheduled to be constructed upon other lands of the Corporation. In return, Family City Development has contracted to make an annual payment to the Metropolitan District Commission of \$1,200. The Commission has also reserved the right to approve final plans and specifications of the proposed roadway and accompanying sidewalk.

In August of last year, twenty-four taxpayers filed a petition in Suffolk Superior Court pursuant to the provisions of G. L. c. 29, § 63, asking that the lease negotiated by the Commission and by Family City Development Corporation be declared invalid, and praying that the parties be restrained from any further action with respect to the proposed access road to the Shopping Center. [See *Evelyn F. Moakley v. Howard Whitmore, Jr.*, Suffolk Superior Court, No. 84319 Equity.] Since the subject matter of your request of September 29, 1965, had been placed in litigation, and a judicial determination appeared to be forthcoming, this Department issued no opinion in response to the said request.

However, after responsive pleadings had been filed on behalf of the Metropolitan District Commission, the petitioners agreed not to continue the litigation, and further represented that they would be content to be governed by whatever opinion the Department of the Attorney General might render in answer to the September 29 letter referred to above. Accordingly, the petition having been dismissed, it is now appropriate for this Department to rule upon the validity of the questioned lease.

The land in question is part of a parcel acquired by the Metropolitan District Commission under an Instrument of Taking dated January 18, 1962. The Order of Taking was adopted by the Commission pursuant to authority conferred upon it by c. 509 of the Acts of 1949, the locus being taken from the City of Boston for the purposes of the said St. 1949, c. 509, as well as for the purposes of § 33 of c. 92 of the General Laws.

General Laws c. 92, § 33 identifies the communities which constitute the Metropolitan Parks District, and provides that the Commission may acquire and maintain in these communities open spaces to be used for exercise and recreation. Section 35 of c. 92 provides as follows:

"The commission may connect any way, park or other public open space with any part of the towns of the metropolitan parks district under its jurisdiction by suitable roadways or boulevards, in this chapter called boulevards, and for this purpose exercise any of the rights and powers

granted the commission in respect to reservations, and may construct and maintain along, across, upon or over lands acquired for such boulevards or for reservations, a suitable roadway or boulevard. The commission shall have the same rights and powers over and in regard to said boulevards as are or may be vested in it in regard to reservations and shall also have such rights and powers in regard to the same as, in general, counties, cities and towns have over public ways under their control."

Accordingly, the Commission has been specifically authorized to connect any public way under its jurisdiction with *any part* of the communities included within the Metropolitan Parks District by "suitable roadways or boulevards."

The powers vested in the Metropolitan District Commission may be implemented pursuant to the provisions of G. L. c. 92, § 83.

"The commission may, for all purposes consistent with the purposes specified in sections thirty-three and thirty-five, erect, maintain and care for buildings, *and grant easements, rights of way or other interests in land, including leases, in any portion of the lands taken or acquired by it for the purposes of said sections*, and may accept and assent to any deed containing reservations of such easements or other interests in land, all for such considerations or rentals, and upon such terms, restrictions, provisions or agreements, as the commission may deem best. . . ." [Emphasis supplied.]

Thus, if the Commission reasonably determines that a roadway authorized by § 35 is desirable, it may—pursuant to § 83—grant certain specified interests in land, including leases, in order to accomplish that purpose. Concurrence by the Park Commissioners of the City of Boston in the granting of such interests is not necessary. Such approval is required by the provisions of c. 92, § 85, which section relates to the *sale* of land or interest therein acquired by the Commission for park or boulevard purposes. Section 83 does not require such approval, and it is apparent that the Legislature did not desire such a requirement to be imposed.

The Metropolitan District Commission has made a determination that it is in the public interest that the land to be developed by the Family City Development Corporation be connected by a roadway with the William J. Day Boulevard. This determination was made after a public hearing, and after consideration not only of expert opinion but also objections of residents of the area. The record of the Commission contains a report by its Chief Engineer indicating that such a roadway would be desirable for the purpose of lessening traffic congestion. Given the said determination that such a roadway is desirable, it was clearly within the discretion of the Commission to provide for construction of the roadway by means of the leasing of a portion of land, thus transferring the costs of construction from the Commonwealth to the lessee.

The lease which is the subject of this opinion represents an obvious economic advantage to the Family City Development Corporation. However, it is apparent that the Metropolitan District Commission has

determined—on the basis of the proceedings and investigations conducted by it—that the economic benefit to be enjoyed by the lessee is secondary and incidental to the public advantage created by the construction of the roadway. Although a court might examine the findings of fact of the Commission to determine whether they were supported by the evidence presented, this Department is in no position to do so. Accordingly, on the facts presented, it is my opinion that the lease in question is a valid exercise of the authority vested in the Metropolitan District Commission by G. L. c. 92, §§ 35 and 83.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Any temporary or trial leave of a patient committed to the Bridgewater State Hospital under § 101 of chapter 123, M.G.L., can be accomplished only with the approval of the Governor. The authorization of the Governor is a clear restriction and cannot be altered by interpretation.

JANUARY 11, 1966.

AMES ROBEX, M.D., *Medical Director, Massachusetts Correctional Institution, Bridgewater.*

DEAR DOCTOR ROBEX:—You have requested my opinion on the legality of authorizing so-called “trial visit weekends” and other temporary absences as a part of the process of treatment of patients committed to the Bridgewater State Hospital pursuant to G. L. c. 123, § 101.

General Laws c. 123, § 101 provides as follows:

“If a person indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital or to the Bridgewater state hospital during his natural life. The governor, with the advice and consent of the council, may discharge such a person therefrom when he is satisfied after an investigation by the department that such discharge will not cause danger to others.”

It is clear—as you note in your letter—that the full discharge of any patient committed under § 101 may lawfully be authorized solely by the method prescribed in that statute. Although approval of such discharge by the Executive Council is no longer necessary [see St. 1964, c. 740, § 4], the language of G. L. c. 123, § 101 compels the conclusion that the Governor alone is ultimately responsible for final release of such patients.

Section 101 of c. 123 does not refer to an absence or release which is less than a full discharge. However, the matter of the temporary release of patients in general, and of those committed under § 101 in particular, is dealt with in § 88 of the same chapter. That section provides in part as follows:

“The superintendent or manager of any institution, after the examination required by section ninety-four has been made, may permit any

inmate thereof temporarily to leave such institution in charge of his guardian, relatives, friends, or by himself, for a period not exceeding twelve months, and may receive him when returned by any such guardian, relative, friend, or upon his own application, within such period, without any further order of commitment, *but no patient committed under section one hundred and one shall be permitted to temporarily leave the state hospital without the approval of the governor and council, nor shall such permission terminate or in any way affect the original order of commitment.*" [Emphasis supplied.]

In view of the plain and unambiguous language of the above-quoted provision, the conclusion is inescapable that any temporary or trial leave of a patient committed under § 101 can be accomplished only with the approval of the Governor. [Concurrence by the Executive Council is—as under § 101—now unnecessary.]

The practice of trial visits followed by other State institutions to which you have referred undoubtedly has arisen pursuant to other language contained in § 88. In the case of commitments under § 101, however, the General Court has specifically provided that even the briefest of absences must be authorized by the Chief Executive of the Commonwealth. This is a clear restriction which cannot be altered by interpretation. Accordingly, I advise you that temporary releases from the Bridgewater State Hospital may be permitted solely in accordance with G. L. c. 123, § 88.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

G. L. c. 156, § 100 must be construed in such a way as to effectuate in a practical way the object of the General Court, and that the authority of the Commissioner of Corporations and Taxation, under that section, therefore extends to all taxes due and payable by the corporation to the commonwealth.

JANUARY 12, 1966.

HON. GUY J. RIZZOTTO, *Commissioner of Corporations and Taxation.*

DEAR COMMISSIONER RIZZOTTO:—You have requested my opinion as to the extent of the Commissioner's obligations with respect to certificates (as to taxes) issued pursuant to G. L. c. 156B, § 100, as amended by St. 1965, c. 685 (effective October 1, 1965).

General Laws c. 156B, § 100, as amended, provides for the voluntary dissolution of corporations. Paragraph (d) of § 100 provides that the Secretary of State shall not receive articles of dissolution for filing unless the Commissioner of Corporations and Taxation certifies that "all taxes due and payable by the corporation to the commonwealth have been paid or provided for." The question arises whether this provision should be read in connection with G. L. c. 14, § 3,* so as to apply only to taxes

administered and enforced by the Department of Corporations and Taxation or literally, so as to require the Commissioner's certificate to relate to *all* taxes.

* G. L. c. 14, § 3, reads in material part as follows: "The commissioner shall be responsible for administering and enforcing all laws which the department is or shall be required to administer and enforce. . . ."

Since not all of the taxes which are due and payable by the corporation to the Commonwealth are administered by the Commissioner, adoption of the latter interpretation would require the Commissioner to review the payment of taxes which ordinarily are not subject to his control. Examples of these taxes are:

- (a) pari-mutuel taxes (c. 128A, §§ 4, 5) ;
- (b) athletic events taxes (boxing matches—c. 147, § 40) ;
- (c) unemployment compensation (payroll) tax—c. 151A.

There are certain practical consequences to restricting the Commissioner's certification solely to those taxes which are administered and enforced by his Department. Having such a certificate, the Secretary of the Commonwealth could receive articles of dissolution for filing. Thus, the process for dissolving a corporation would be set in motion although it could well be that *all* taxes due and payable to the Commonwealth might not actually have been paid.

It is my opinion that G. L. c. 156B, § 100 should be given a literal reading, so as to require the Commissioner's certificate to relate to all taxes and not solely to those taxes administered and enforced by the Department of Corporations and Taxation. The Legislature has given the Commissioner of Corporations and Taxation sole responsibility for issuing certificates (as to taxes) to corporations which seek to dissolve. No other officials have been vested with similar responsibility. It is extremely unlikely that the Legislature would select a single official to make the particular certification, and then reduce the effectiveness of the certificate by exempting certain taxes from his jurisdiction.

Moreover, it would appear that the General Court intended the Commissioner's authority to extend to *all* taxes, since otherwise, as indicated above, there is a real danger that a corporation may dissolve prior to fulfillment of all of its tax obligations. While it is true that a corporation continues as a body corporate for three years after the time of dissolution for the purpose of prosecuting and defending suits (see G. L. c. 156B, § 102), it is nevertheless clearly advantageous to compel the settlement of all accounts with the Commonwealth prior to dissolution.

General Laws c. 156B, § 100 requires that the Commissioner certify that "all taxes due and payable to the Commonwealth have been paid or provided for." [Emphasis supplied.] This obligation extends only to taxes imposed by and owed to the Commonwealth. It does not—as suggested in your letter—extend to general property taxes which are assessed and collected by the cities and towns. Accordingly, it is my opinion that the provisions of G. L. c. 156B, § 100 must be construed in such a way as to effectuate in a practical way the object of the General

Court, and that the authority of the Commissioner under this section therefore extends to *all* taxes due and payable by corporations to the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

G. L. c. 128A, § 3(p) does not permit the establishment of a racing meeting within two radial miles (miles measured as the crow flies) of a church, school or housing development.

JANUARY 13, 1966.

HON. PAUL W. WALSH, *Chairman, State Racing Commission*.

DEAR MR. WALSH:—The State Racing Commission has requested my opinion as to whether St. 1965, c. 629, in any way modifies my earlier opinion of January 18, 1965, that G. L. c. 128A, § 3(p) does not permit the establishment of a racing meeting within two radial miles of a church, school or housing development. I use the term “radial miles” to mean “miles measured as the crow flies” and to distinguish the same from miles measured along public ways. See *Cleary v. Cardullo's, Inc.*, 347 Mass. 337.

In my earlier opinion I referred to G. L. c. 138, § 16C for purposes of contrasting that statute with G. L. c. 128A, § 3(p). At the time of my opinion, G. L. c. 138, § 16C read in part as follows:

“Licenses for premises near churches or schools. Premises, except those of an innholder, located within five hundred feet, measured along public ways, of a church or school shall not be licensed for the sale of alcoholic beverages; but this provision shall not apply to the transfer of a license from premises located within the said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location.”

I cited the above language merely to point out that when the Legislature intended the measurement of a distance to be “along public ways,” it stated its intention explicitly. Apparently the Legislature has now decided to adopt a different standard of measuring distances from churches and schools for purposes of determining whether establishments at particular locations may be licensed for the sale of alcoholic beverages. In 1965, the General Court enacted c. 629, § 1, which declares:

“Section 16C of chapter 138 of the General Laws is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:—Premises, except those of an inn-holder, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages; but this provision shall not apply to the transfer of a license from premises located within the said distance to other premises located therein, if it is transferred to a

location not less remote from the nearest church or school than its former location."

I see nothing in this amendment which would modify my interpretation of G. L. c. 128A, § 3(p) given in the earlier opinion. That opinion did not say, nor did it in any way imply, that the method of measuring distances under G. L. c. 128A, § 3(p) must necessarily and forever differ from the method to be employed when distances are measured for the purposes of G. L. c. 138, § 16C.

All legal authority that I have consulted indicates that my interpretation of G. L. c. 128A, § 3(p), requiring that the distance between the nearest boundary of the racing establishment and the nearest church, school or housing development exceed two miles "as the crow flies," is correct. As far as I can determine, whenever the preposition "within" has taken as its object a word or phrase designating spatial distance, the courts, both in Massachusetts and elsewhere, have measured that distance radially, unless, of course, there was an explicit requirement that the distance be measured "along public ways" or according to another non-radial standard. See *Commonwealth v. Jones*, 142 Mass. 573, 575-576 and *Dougherty v. Kentucky Alcoholic Beverage Control Board*, 279, Ky. 262, 267 (distance "along same street" measured radially); *Board of Trustees of the Leland Stanford University v. State Board of Equalization*, 1 Cal. 2d 784, 786; *In re Greenfield*, 32 N.Y.S. 2d 471, 472, 473, *Ralls v. Parish*, 105 Tex. 253, 260; *Territory ex. rel. Oklahoma v. Robertson*, 19 Okl. 149, 156. See also 96 A.L.R. 778-780. Cf. *Cleary v. Cardullo's, Inc.*, *supra*; *State Beverage Dept. v. Brentwood Assembly of God Church*, 149 So. 2d (Fla.) 871, 874-876 (measurement along public ways explicitly required by statute.)

Even were there authority for the proposition that the distance "within" which certain establishments are proscribed should ordinarily be measured along public ways when the distance is a relatively short one, I do not believe that such authority would apply to such longer distances as two miles. Whereas the purpose of G. L., c. 138, § 16C is, apparently, that worshippers and school children should not be disturbed by persons drinking in a public place, the purpose of G. L., c. 128A, § 3(p) is, in my opinion, to protect churches, schools and housing developments (several of the latter are specifically for elderly persons—see G. L. c. 121, § 26SS *et. seq.*) from the intense night lighting and noise that frequently accompany racing.

Such protection could not be afforded to those whom the Legislature intended to protect if the measurement of the prescribed distance were along public ways. Because of the turning and twisting of many public ways, particularly in rural areas, a church, school or housing development could well be within one radial mile or less of a racing establishment yet more than two miles away by public highway. Light and noise travel radially, not along public ways.

You state in your letter that last year you "dismissed" the application of Tyngsborough Enterprises, Inc. to conduct a racing establishment because it was within two radial miles of the Winslow School in Tyngsborough and that the same Tyngsborough Enterprises has filed

another application this year. Assuming that neither the racing establishment nor the school is now in a different location, I remain of the opinion that a license may not lawfully be issued to this applicant.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The application of § 9A, c. 30, M.G.L. requires that there be three immediate, consecutive years of service in a permanent position to qualify for the protection of that section.

The vacating of a permanent position and acceptance of a temporary position terminates the immediate, continuous service in that permanent position and thereby terminates the tenure acquired thereunder.

JANUARY 14, 1966.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health*.

DEAR DOCTOR SOLOMON:—In your letter of December 13, 1965, you have requested my opinion with regard to the tenure of a veteran who vacates his permanent position for a temporary period.

You state that a veteran, as defined in G. L. c. 31, § 21, was appointed to a permanent position as Superintendent of State Hospital, under the provisions of G. L. c. 123, § 28, effective May 1, 1960. You further state that this veteran is now to be appointed by the Commissioner of Mental Health to the temporary position of Superintendent of State Hospital in the Central Department.

On these facts, you ask “. . . whether or not a veteran . . . retains tenure in the permanent position he has vacated on a temporary basis?”

Your request raises no question of the eligibility of this individual for classification as a veteran under G. L. c. 31, § 21 nor of his qualifications for the subsequent appointment as Superintendent of State Hospital under G. L. c. 123, § 28. Accordingly, for purposes of this opinion, I have assumed that the individual you describe is properly a veteran as defined in c. 31, § 21 and that he has been duly appointed to the permanent position of Superintendent of State Hospital under c. 123, § 28. This opinion will, therefore, be limited solely to the question of whether tenure in his permanent position will continue during the period of his temporary employment in another position with the Department.

The tenure of veterans employed in state service is provided for by G. L. c. 30, § 9A. That section provides in part as follows:

“A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, . . . and has held *such office* or position for not less than three years, shall not be involuntarily separated from *such office* or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter.” [Emphasis supplied.]

A veteran appointed under c. 123, § 28 to the position of Superintendent of State Hospital is the holder of a permanent position in the service of the Commonwealth not classified under c. 31. As such, having held that position since May 1, 1960, a period "not less than three years," he is clearly within the purview of c. 30, § 9A, and may not be separated involuntarily from that position except in accordance with the provisions of G. L. c. 31, §§ 43 and 45.

The question remains, however, as to the legal effect of a temporary appointment upon his prior tenure rights earned under § 9A in the original position to which he expects subsequently to return.

It has long been settled in this Commonwealth that the application of § 9A requires that there be three immediate, consecutive years of service in a permanent position to qualify for the protection of that section. (*Chairman of the State Housing Board v. Civil Service Commission*, 332 Mass. 241, 244, 245.) It does not appear to have been the intention of the General Court to allow veterans to leave their permanent positions for interim jobs and still retain their privileged status under § 9A. As was discussed in an opinion of my predecessor (Opinion of the Attorney General, Feb. 8, 1961), this would clearly frustrate the purpose of this statute, which is to insure "steadiness of occupation." There is no means of determining when, if ever, the temporary appointment would end. Nor is there any assurance that the individual in question would ultimately return to the permanent position in which he had originally acquired tenure. Such uncertainty in employment is precisely what the Legislature intended to avoid. The language of § 9A that

"... a veteran who ... has held *such office or position* for not less than three years, shall not be involuntarily separated from *such office or position*..." [Emphasis supplied.]

confirms this by restricting the scope of the tenure to the immediate position in which the tenure was acquired.

A veteran holding the permanent position of Superintendent of State Hospital for the period required by c. 30, § 9A would be entitled to the protection accorded civil servants under c. 31. However, upon his transfer to a new, temporary position, tenure is not transferred to the new position (Opinion of the Attorney General, Dec. 3, 1957, p. 39) and prior tenure would cease to exist. Consequently, tenure would not attach to the transferred employee during the period of his temporary appointment, nor would tenure be restored to him upon return to his original or another permanent position.

Upon the facts as you have stated them, therefore, it is my opinion that the answer to your question is in the negative. The vacating of the permanent position of Superintendent of State Hospital and acceptance of a temporary position in the Central Department terminates the immediate continuous service in that permanent position and thereby terminates the tenure acquired thereunder.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The authority of the Lake Quinsigamond Commission to regulate the filling of Lake Quinsigamond must be shared with the Dept. of Public Works and the Dept. of Natural Resources in accordance with the provisions of c. 220 of the Acts of 1965. However, the commission's authority is not to be subservient to that of the other departments.

The applications to fill the waters of Lake Quinsigamond must be made in accordance with the procedures prescribed therefor by the Commission and the procedure set forth in St. 1965, c. 220, and the filling of the Lake is subject to the concurrent authority of the Commission and the Departments referred to in the 1965 Act.

JANUARY 14, 1966.

HON. WALTER J. MOOSSA, *Chairman, Lake Quinsigamond Commission.*

DEAR MR. MOOSSA:—You have requested my opinion with regard to the authority and jurisdiction of your Commission to regulate the filling of the waters of Lake Quinsigamond.

Specifically, you have asked “whether or not the Lake Quinsigamond Commission has:

(1) Jurisdiction (Sole).

(2) Paramount authority under law over any other Constituted Body to regulate the filling or denial of such rights to fill any of the waters of Lake Quinsigamond.

(3) Whether or not our authority is subservient to authority granted to others under Acts of 1965, Chapter 220 which Act regulates Inland Waters in The Commonwealth.”

The law of this Commonwealth applicable to the questions you raise is contained in Special Acts of 1916, c. 294, as amended by c. 435 of the Acts of 1935, and Acts of 1965, c. 220.

Chapter 294 of the Special Acts of 1916, as amended, which sets out the authority of the Lake Quinsigamond Commission, provides in part as follows:

“The said commission may establish reasonable rules and regulations for the protection and policing of the waters of Lake Quinsigamond. . . .”

Chapter 435 of the Acts of 1935, further defining the authority of the Lake Quinsigamond Commission, contains the following provision:

“The Lake Quinsigamond Commission . . . is hereby authorized and directed to prohibit . . . the entrance or discharge therein of any substance which . . . might tend . . . to fill in said lake. . . For the purposes of this section said commission may make orders, rules and regulations.”

Chapter 220 of the Acts of 1965, regulating inland waters, provides in part:

“No person shall remove, fill or dredge any bank, flat, marsh, meadow or swamp bordering on any inland waters without filing written notice of his intention to so remove, fill or dredge . . . with the board of selectmen

in a town or the mayor of a city, and with the state departments of public works and natural resources. . . . The selectmen or mayor *may recommend* such protective measures as may protect the public interest. *The department of public works shall determine whether the proposed activity would violate any provisions of chapter ninety-one and shall take such action as may be necessary to enforce such provisions.* If the area on which the proposed work is to be done is determined by the department of natural resources to be essential to public or private water supply or to proper flood control, *the department shall by written order signed by the commissioner impose such conditions as may be necessary to protect the interests described herein, and the work shall be done in accordance therewith. . . .* [Emphasis supplied.]

If there is an irreconcilable conflict between a new legislative provision and a prior statute relating to the same subject matter, the latter expression of the Legislature must, of course, control. However, an effort must be made where possible to construe each statute or set of statutes in such a way as to effectuate as harmoniously as possible the provisions of each.

In the present situation, prior to the enactment of c. 220 of the Acts of 1965, the authority of the Lake Quinsigamond Commission to regulate the filling of Lake Quinsigamond was unrestricted. The mandate of c. 294 of the Special Acts of 1916, clearly unlimited in its terms, must be deemed to have included any authority reasonably necessary and incidental to the protection of Lake Quinsigamond. In the context of the Commission's responsibility, authority to regulate the filling of Lake Quinsigamond could be considered reasonably necessary and incidental to the effective performance of the Commission's duties, even prior to the passage of St. 1935, c. 435.

It would appear, therefore, that such authority was impliedly vested in the Lake Quinsigamond Commission by virtue of the general grant of c. 294 of the Special Acts of 1916. Express authority to regulate the filling of Lake Quinsigamond was, however, granted the Commission by c. 435 of the Acts of 1935.

Subsequent to these grants of authority to the Lake Quinsigamond Commission, the Legislature enacted c. 220 of the Acts of 1965, which chapter authorized the Department of Public Works and the Department of Natural Resources to take certain actions with respect to lands bordering inland waters. Although St. 1965, c. 220 is the most recent relevant legislative pronouncement, its passage does not necessarily abrogate the earlier grants of authority to the Lake Quinsigamond Commission. Rather, in accord with the rules of statutory construction noted earlier, that enactment must—if possible—be construed in conjunction with the earlier statutes.

Considering all of the relevant statutes, it would appear that the grant of authority in c. 220 of the Acts of 1965 does not abolish the similar authority vested in the Lake Quinsigamond Commission. The powers created by c. 220 are complementary to those of the Lake Quinsigamond Commission, the Legislature having limited the Commission's earlier unilateral exercise of control over the Lake. Chapter 220 of the Acts of 1965 limits the authority of the Lake Quinsigamond Commission by

granting to the Department of Public Works and the Department of Natural Resources certain reciprocal powers to be exercised in the same context.

It is my opinion, therefore—in giving fullest effect to the Acts in question—that the Commission's authority to regulate the filling of Lake Quinsigamond must be shared with the Department of Public Works and the Department of Natural Resources in accordance with the provisions of c. 220 of the Acts of 1965. Accordingly, the answers to your first two questions are in the negative. The Commission does not have either sole jurisdiction or paramount authority to act upon petitions for filling of the waters of Lake Quinsigamond. However, nothing in the above-mentioned Acts indicates that the authority of the Commission is to be subservient to that of the other Departments. The statutes contemplate dual responsibility, not complete subjection of one agency by another. Accordingly, in response to your third question, it is my opinion that applications to fill the waters of Lake Quinsigamond must be made in accordance with the procedures prescribed therefor by the Commission and the procedures set forth in St. 1965, c. 220, and that the filling of the Lake is subject to the concurrent authority of the Commission and the Departments referred to in the 1965 Act.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Legislature can constitutionally abolish an office and cut off whatever tenure rights have attached thereto.

The position, of Chairman of the State Housing Board, and Director of Urban and Industrial Renewal did not survive the reorganization effected by St. 1964, c. 636. Hence, employment in said positions must be considered to have terminated on the effective date of said Act, August 6, 1964.

JANUARY 14, 1966.

✓ HON. THEODORE W. SCHULENBERG, *Commissioner, Department of Commerce and Development*.

DEAR COMMISSIONER SCHULENBERG:—On January 12, 1966, you requested my opinion with regard to the status of Mr. Leo F. Benoit and Mr. John A. Letteney, each of whom was tried and acquitted by a Suffolk County jury on January 11 of this year. You have recited the following relevant facts, all of which are a matter of public record.

Mr. Leo F. Benoit was appointed by the Governor—with the advice and consent of the Executive Council, as then required—to the position of Chairman of the State Housing Board [see G. L. c. 6, § 64] on January 7, 1960. On May 10, 1963, Mr. Benoit was indicted by a Suffolk County grand jury acting upon certain evidence presented to it after investigations by the Massachusetts Crime Commission. On July 10, 1963, as a result of the indictment, Mr. Benoit was suspended by the Governor under the provisions of G. L. c. 30, § 59, the so-called Perry Law. On August 6, 1964, the State Housing Board was abolished [see St. 1964, c.

636, § 10]. [The effective date of the abolition is—in accordance with St. 1964, c. 636, § 23—determined on the basis of the date of appointment and qualification of the new Commissioner of Commerce and Development.] Mr. Benoit was—as indicated above—tried in Suffolk County, and, on January 11, 1966, was acquitted by a jury. You have asked the following questions with respect to the status of Mr. Benoit:

“(1) Does Leo F. Benoit’s employment with the Commonwealth of Massachusetts terminate on August 6, 1964?

“(2) Is Mr. Benoit entitled to his salary from July 10, 1963 (the date of his suspension) to August 6, 1964 (the effective date of the reorganization) or to January 7, 1965 (the date when his term of office would have expired)?”

Mr. John A. Letteney was appointed by the then Chairman of the State Housing Board to the position of Director of the Division of Urban and Industrial Renewal on July 30, 1961. After being indicted by a Suffolk County grand jury, he was suspended under c. 30, § 59 on July 12, 1963. During the period of his suspension, Mr. Letteney—as a veteran of World War II—acquired tenure under c. 30, § 9A. On August 6, 1964, the office of Director of the Division of Urban and Industrial Renewal was abolished [see St. 1964, c. 636, § 13]. Mr. Letteney was likewise acquitted by a Suffolk County jury on January 11, 1966. You have posed the following inquiries with respect to Mr. Letteney:

“(1) Does Mr. Letteney have a legal right to a position in the Department of Commerce and Development?

“(2) Is Mr. Letteney legally entitled to any salary from the date of his suspension?

“(3) If Mr. Letteney is legally entitled to salary, is the date of the reorganization (August 6, 1964) a cut-off date?”

You have further indicated that Mr. Letteney has another indictment pending against him, with no record of a suspension on file; accordingly, you also ask—if it be determined that Mr. Letteney has no present employment status—whether a suspension under c. 30, § 59 will be necessary.

Your request necessitates an analysis of the provisions of c. 636 of the Acts of 1964, which Act created a new Department of Commerce and Development, and a careful application of the provisions of the Perry Law. I will deal first with these statutes as they are applicable to Mr. Benoit, and then as they are applicable to Mr. Letteney.

Section 10 of c. 636 of the Acts of 1964 provides as follows:

“The state housing board is hereby abolished. The powers and duties formerly exercised by said board are hereby transferred to the department of commerce and development established under the provisions of chapter twenty-three A of the General Laws, inserted by section one of this act.”

The State Housing Board was simply one of a variety of boards and agencies whose duties were transferred to the new Department of

Commerce and Development. The General Court carefully provided for the concomitant transfer of many specific positions within or under such boards and agencies.

"Upon the effective date of this section all permanent and temporary positions in any board, agency, division, bureau, section or other administrative unit under the department of commerce, the state housing board, the division of urban and industrial renewal, the mass transportation commission and the Massachusetts commission on atomic energy existing immediately prior to the said date, *except the chairman and members of the state housing board, the director of urban and industrial renewal, the chairman and members of the mass transportation commission, and the coordinator and members of the Massachusetts commission on atomic energy*, shall be transferred to the department of commerce and development. . . ." [Emphasis supplied.]

St. 1964, c. 636, § 15.

Thus, the position of Chairman of the State Housing Board did not survive the reorganization effected by this chapter. Likewise, it is clear that the Legislature did not intend to transfer the particular incumbent of that position. Section 16 of Chapter 636 of the Acts of 1964 provides for the transfer and classification of employees who had tenure rights in positions transferred to the new Department of Commerce and Development pursuant to the provisions of § 15 quoted above. Sections 17 and 18 relate to the transfer and classification of employees who were without tenure, but also indicate that transfer of such employees is contingent upon the transfer of their positions under § 15.

It is clear that Mr. Benoit did not have tenure as Chairman of the State Housing Board; nor was his position transferred to the new Department under the provisions of § 15 of the reorganization Act. Accordingly, since the position of Chairman of the State Housing Board has been abolished, and since no tenure or transfer provision operates so as to insure Mr. Benoit employment in the new Department of Commerce and Development, it is my opinion that Mr. Benoit's employment with the Commonwealth must be considered to have terminated on the effective date of the reorganization Act [August 6, 1964].

However, the fact that Mr. Benoit is not entitled to a position within the new Department of Commerce and Development does not mean that the Commonwealth may be exempted from meeting its past obligations to him. Since Mr. Benoit was suspended under the provisions of the Perry Law, he is entitled also to the protection of that statute. Chapter 30, § 59 provides in relevant part:

"If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilt, on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary *due him for the period of his suspension*, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement." [Emphasis supplied.]

Since criminal proceedings instituted against Mr. Benoit have ter-

minated without a finding or verdict of guilty, Mr. Benoit must now be granted all compensation and other privileges which were withheld during the period of his suspension. However, the right of an employee of the Commonwealth to compensation and to other benefits relates solely to the period of time during which he actually held a given position. The Perry Law specifically provides for restoration of back-pay and other benefits *due him for the period of his suspension*. An employee cannot be considered to have been suspended after the date on which his position was abolished by the Legislature. It is my opinion that Mr. Benoit's right to hold the position of Chairman of the State Housing Board, and his suspension from that position came to an end simultaneously on August 6, 1964, the effective date of the creation of the Department of Commerce and Development. Accordingly, Mr. Benoit is now entitled to the compensation and other benefits which—were it not for the suspension—he would have received from July 10, 1963 (the date of his suspension) to August 6, 1964 (the effective date of the reorganization).

The provisions of the Act reorganizing the Department of Commerce and Development and the provisions of the Perry Law apply in a similar way to the status of Mr. John A. Letteney. The office of Director of the Division of Urban and Industrial Renewal held by Mr. Letteney was abolished by section 13 of Chapter 636 of the Acts of 1964.

"The office of the director of urban and industrial renewal is hereby abolished. The powers and duties formerly exercised by the division of urban and industrial renewal are transferred to the department of commerce and development established under the provisions of chapter twenty-three A of the General Laws, inserted by section one of this act."

Since Mr. Letteney enjoyed the tenure rights of a veteran under chapter 30, § 9A, his right to be employed within the new department depends upon the provisions of § 16 of the reorganization Act.

"Upon the effective date of this section any employee of any board, agency, division, bureau, section or other administrative unit under the department of commerce, the state housing board, the division of urban and industrial renewal, the mass transportation commission, or the Massachusetts commission on atomic energy, who immediately prior to said date had tenure under section nine A of chapter thirty or section twenty-six § of chapter one hundred and twenty-one of the General Laws in any permanent position *which, pursuant to section fifteen, shall be transferred to the department of commerce and development established under the provisions of chapter twenty-three A of the General Laws, inserted by section one of this act, and shall be classified under chapter thirty-one of the General Laws, shall, without being subjected to a qualifying examination by the division of civil service or being required to serve a probationary period, be deemed to be permanently appointed to such position . . .*" [Emphasis supplied.]

Under section 15 of the reorganization Act as previously quoted in this opinion, it is clear that the position of Director of Urban and Industrial Renewal was not transferred to the new Department. Since this office has

not been transferred under § 15, the provisions of § 16 are not applicable to Mr. Letteney and he is not entitled to a position within the new Department.

It is clear that the General Court has the authority to abolish a position despite the fact that its incumbent has acquired tenure rights therein. The Supreme Judicial Court has stated—in *Bessette v. Commissioner of Public Works*, 1965 Adv. Sh. 367—that abolition of such a position is within the legislative power.

“There is no basis for concluding that the change was made for any reason other than the public interest. That the petitioner is the only person . . . whose position was abolished shows no invasion of a constitutional right . . . The abolition of the office necessarily entailed the ending of the civil service . . . rights inherent in the office.” [Pp. 371-372.]

Accordingly, it is my opinion that the Legislature could constitutionally abolish the office held by Mr. Letteney and cut off whatever tenure rights had attached thereto. It is clear that the Legislature has in fact done so, and that Mr. Letteney is not entitled to any position with the new Department of Commerce and Development.

Nevertheless, as in the case of Mr. Benoit, the Commonwealth cannot lawfully withhold the rights which have accrued to Mr. Letteney under c. 30, § 59. Since the proceedings against Mr. Letteney have terminated without a finding or verdict of guilty, he is entitled to receive all compensation and other benefits which had been withheld during the period of his suspension. But the period of Mr. Letteney's suspension cannot be said to extend beyond the date of abolition of the position from which he was suspended. Thus, he is entitled to receive all compensation and other benefits which would have accrued to him from July 12, 1963 [the date of his suspension] to August 6, 1964 [the date of abolition of his position.] Since Mr. Letteney has no present status as an employee of the Commonwealth, it is unnecessary to consider your questions with regard to a further suspension.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

G. L. c. 90, § 9 authorizes the use of unregistered earth-moving vehicles simultaneously with general public use of the highway which is being altered or constructed, assuming of course that an officer is present to direct traffic as required in said section.

JANUARY 17, 1966.

HON. FRANCIS W. SARGENT, *Commissioner, Department of Public Works*.

DEAR COMMISSIONER SARGENT:—You have requested my opinion on the application of G. L. c. 90, § 9 to certain earth-moving vehicles used on highways which have already been opened for use by the public. Specifically, you have asked “whether said section (G. L. c. 90, § 9) applies in the case of a contractor using such equipment on a highway

which has been opened for convenience of the traveling public prior to the completion of all the work called for by the contract."

General Laws c. 90, § 9 provides in part as follows:

"No person shall operate, push, draw or tow any motor vehicle or trailer, and the owner or custodian of such a vehicle shall not permit the same to be operated, pushed, drawn or towed upon or to remain upon any way except as authorized by section three, unless such vehicle is registered in accordance with this chapter . . . and except that an earth-moving vehicle used exclusively for the building, repair and maintenance of highways . . . may be operated without such registration for a distance not exceeding three hundred yards on any way adjacent to any highway or toll road being constructed, relocated or improved under contract with the commonwealth or any agency or political subdivision thereof or by a public instrumentality; provided, that a permit authorizing the operation of such a vehicle in excess of the stated weight or dimension limits (described elsewhere in the statutes) has been issued by the commissioner of public works or the board or officer having charge of such way; and *provided, further, that such earth-moving vehicle shall be operated under such permit only when directed by an officer authorized to direct traffic at the location where such earth-moving vehicle is being operated. . . .*" [Emphasis supplied.]

The language of the above-quoted section is clear. Earth-moving equipment used exclusively for the building, repair and maintenance of highways may, in accordance with the provisions quoted above, be operated without registration, on any way adjacent to any highway or toll road being constructed, relocated or improved. There is no express restriction upon the operation of such vehicles during public use of the highway, and no such restriction is to be implied.

Specific provisions of § 9 clearly negate the existence of such a restriction. That section permits the operation of unregistered earth-moving vehicles "only when directed by an officer authorized to direct traffic" at the operational site of the work. This provision, given its plain meaning, demonstrates the intent of the Legislature that the vehicles described in the statute be allowed to operate simultaneously with a regular traffic flow.

As a practical matter, considering both the necessity of keeping present roads open to the public and the continuing need for highway improvement, it is apparent that the General Court sought to reconcile these sometimes competing demands whenever possible. Thus the Legislature has provided that—in the absence of undue danger or impossibility of performance—the process of relocation and improvement of highways should continue with as little disruption of normal use of the roads as possible. Accordingly, it is my opinion that G. L. c. 90, § 9 does authorize the use of unregistered earth-moving vehicles simultaneously with general public use of the highway which is being altered or constructed, assuming of course that an officer is present to direct traffic as required therein.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Playboy of Boston, Inc., is not a "club" as that term is used in G. L. c. 138. If the Alcoholic Beverages Commission is otherwise satisfied with the application filed by the corporation, and the latter has complied with all other relevant statutes and regulations, the Commission has the legal authority to grant Playboy of Boston, Inc., an all-alcoholic beverage restaurant license under the provisions of G. L. c. 138 § 12.

JANUARY 17, 1966.

HON. QUINTIN J. CRISTY, *Chairman, Alcoholic Beverages Control Commission.*

DEAR MR. CRISTY:—You have asked for my opinion with regard to an application for renewal of a seven-day all alcoholic beverages restaurant license filed by a corporation known as Playboy of Boston, Inc. You have forwarded to me—as a part of your request—copies of a statement filed with your Commission by Mr. Richard Perkins, President of Playboy of Boston, Inc., and a franchise agreement entered into by Playboy of Boston, Inc. and Playboy Clubs International, Inc., a Delaware corporation licensed to do business in the State of Illinois. The statement and the franchise agreement provide information which is necessary in order to determine the nature of the business to be conducted by Playboy of Boston, Inc.

You have included among your questions the inquiry "whether or not Playboy of Boston, Inc., is in any way in violation of our statutes in guaranteeing payment of credits (customer charges), when keys are presented, and where the Playboy Clubs International, Inc. participate in the profits of the so-called "cover-charge" and other profits of the Playboy of Boston, Inc." You further ask—on the subject of the twenty-five dollar "cover-charge" fee—"whether or not (such a fee), as described for a paper key, is not excessive." However, it is apparent that these questions are subsidiary in nature, and I gather that you are primarily concerned with determining whether—given the facts you have provided—the operations contemplated by Playboy of Boston, Inc. would comply with the conditions upon which an all alcoholic beverages restaurant license is issued.

Playboy of Boston, Inc. has sought the renewal of an all alcoholic beverages restaurant license under the provisions of G. L. c. 138, § 12.

"A common victualler duly licensed under chapter one hundred and forty to conduct a restaurant . . . in any city or town wherein the granting of licenses under this section to sell all alcoholic beverages or only wines and malt beverages, as the case may be, is authorized by this chapter . . . , may be licensed by the local licensing authorities, subject to the prior approval of the commission, to sell to travellers, strangers and other patrons and customers not under twenty-one years of age, such beverages to be served and drunk . . . only in the dining room or dining rooms. . . ."

An establishment which operates under the authority of such a license must, in accordance with the language quoted above, serve the public in general, and cannot elect to cater to a restricted clientele.

Those wishing to dispense alcoholic beverages to a limited class of persons may—under other provisions of c. 138—apply for a so-called “Club” license. A “Club” is defined in § 1 of c. 138 as “a corporation chartered for any purpose described in section two of chapter one hundred and eighty . . . , including also any organization or unit mentioned in clause twelfth of section five of chapter forty, owning, hiring, or leasing a building, or space in a building, *of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members. . .*” [Emphasis supplied.] Such organizations may be licensed to dispense alcoholic beverages in accordance with G. L. c. 138, § 17:

“Irrespective of the number of licenses that may otherwise be granted in cities and towns as provided in clauses (1) to (5), inclusive, of this section, the local licensing authorities may grant to legally chartered clubs in any such city or town five additional licenses under section twelve, and such authorities in any city or town having a population exceeding twenty-five thousand may grant one additional license as aforesaid for each population unit of ten thousand or fraction thereof over twenty-five thousand. . . .”

A club is characterized by the fact that certain restrictions upon membership are imposed, and that the public in general is not admitted. The club ordinarily reserves the right to reject applicants for membership and to maintain some degree of exclusiveness with respect to those who are to be allowed to take advantage of its facilities. But the all alcoholic beverages restaurant license authorized by § 12 of c. 138 discussed above requires that the public at large be accommodated. Clearly, a holder of such a license could not lawfully follow the more restrictive policies which are typical of the ordinary club. Accordingly, the primary question to be resolved is whether Playboy of Boston, Inc. is in fact a club for purposes of c. 138. Should it be determined that the corporation does actually operate as a club, it would follow that it does not qualify for the type of license (one which authorizes service to the general public) for which it has applied.

The documents which you have provided indicate the following with respect to the operational policies of Playboy of Boston, Inc. A member of the public may gain access to the corporation’s establishment in one of two ways. He may apply for and—after a satisfactory check of his credit rating—be issued a metal key. The fee which must accompany such an application is twenty-five dollars for those in Metropolitan Boston. Possession of such a key authorizes the holder to enter any Playboy establishment in Boston or elsewhere at any time during normal hours with no further charge (except of course for food, drink, etc., purchased once the customer is inside).

However, possession of a key is not necessary to enter the premises. Any member of the public may—upon payment at the entrance of a twenty-five dollar fee—immediately be admitted. At the same time, he will be given a receipt (referred to in the franchise agreement as a Franchisee-issued paper key) evidencing the twenty-five dollar payment which—like the metal key—will guarantee him admittance to any Playboy establishment at any time with no further admission charge.

The only distinction drawn between those who hold metal keys and those who hold the paper variety is that the former—whose credit ratings have been examined—are entitled to purchase food, drink and other items on credit, whereas the latter are obliged to pay for what they receive in cash. The metal key opens no door, and secures admittance for the holder no more quickly than does the paper receipt. The metal key seems to represent more or less what a credit card represents—*i.e.*, simply that the bearer has a charge account. None of the information which is before me warrants the conclusion that guests with metal keys are treated in any way differently from those with paper receipts.

Based upon the facts recited above, nothing more appearing, it is my opinion that Playboy of Boston, Inc. contemplates the operation of an establishment which serves the general public, and which cannot be said to be a “club” for purposes of c. 138 of the General Laws. It is apparent that any member of the public may enter upon payment of the twenty-five dollar fee, a payment which must be made only a single time. The fact that some guests may have charge account privileges and that others are compelled to pay cash represents only a method of doing business chosen by the corporation, and does not lead to a conclusion that those favored by the possession of what is referred to as a key, but is actually a credit card, are really members of a club who are to be given preferred treatment. The provisions of the franchise agreement which describe contemplated campaigns to solicit new keyholders indicate that the officers and directors of the contracting corporations are primarily concerned with expanding rather than limiting their clientele. These are profit-making organizations, and profits generally increase with the numbers availing themselves of the entertainment offered. Although labels used or avoided by the parties are admittedly not determinative, it is interesting to note that the Playboy establishment in Boston is not referred to as a “club” by its organizers, nor are the prospective customers called “members.”

It is of minor importance to the resolutions of this question whether the initial twenty-five dollar fee is to be called a “membership fee” or a “cover-charge.” The charging of admission does not by itself mean that a place is not open to the public.

“... it does not follow that the imposition of an admission fee—on payment of which any member of the public may enter plaintiff’s premises and purchase liquor for consumption thereon—in any way makes plaintiff’s premises not open to the general public. . . .

Playboy Club of New York Inc. v. Hostetter, New York Supreme Court, Index No. 5091-1963; Aff’d., Appellate Division, Vol. 150, N.Y. L. J., No. 86, p. 12 (1963). Affirmed without opinion by the Court of Appeals on July 10, 1964.

... a place may be public though a weekly, monthly or seasonal basis for charging admission is employed. . . . *Matter of Castle Hill Beach Club, v. Arbury*, 2 N.Y.2d 596, 601.”

The general public frequents a variety of places which charge admission fees by the day, season or some other time-period—restaurants, athletic stadia, beaches, national monuments, etc. It is not for the Attorney

General to determine that a twenty-five dollar fee is too large, or that the practice of requiring a single initial admission payment should be discontinued. These are matters for the judgment of private businessmen, and do not—at least in the present case—affect the conclusion that Playboy of Boston, Inc. serves the public in general.

This very question has been considered by the Court of Appeals of the State of New York in the *Hostetter* case cited above, and by the Supreme Court of Illinois in *Walton Playboy Clubs, Inc. v. City of Chicago*, 185 N.E.2d 719. In each case, the Court has ruled that the Playboy establishment in question did in fact service the public in general without discrimination, and that the regulatory statutes of the State had not been violated. In the *Walton* case, the Court commented as follows:

"The plaintiff's facilities are open to the public; the \$50.00 requirement [\$50.00 was the fee in Illinois] is the only restriction on admission and anyone who is willing to pay this one-time fee can enter, with guests, as often as he wishes. In this respect it does not differ, except in the size of the fee, from many other places where alcoholic beverages and food are served and where entertainment is presented. If it is visited with some frequency or with guests, the fee is far less than charged by other Chicago establishments where a cover charge is exacted for each individual each time the establishments are patronized."

Both New York and Illinois have provisions in their alcohol regulation statutes similar to the Massachusetts requirement of service to the general public by ordinary licensees. Nothing distinguishes the operation which is planned by Playboy of Boston, Inc. from those in New York and Illinois, which the court of last resort of each state has concluded are public rather than private in nature.

I am well aware of the fact that the Playboy establishment in Boston will—like those already opened in other major cities—have the veneer of a club. Playboy Clubs International, Inc. and the organizations which that corporation has enfranchised for the purpose of operating dining and entertainment spots, have, intentionally or unintentionally, given the impression that there is something exclusive about their operations, and that these establishments have been developed primarily for persons of sophistication. There appears to be a fairly widespread public misconception about the existence of restrictions upon entry into a Playboy location. But this ruling cannot be based upon the fashion in which certain members of the public may happen to view the operation of the corporations in question. All of the facts which are before me indicate that Playboy of Boston, Inc. does not plan to impose restrictions upon those who may enter, and that the corporation will cater to the general public without limitation. I can see nothing in the proposed plan of operation which would violate any of the provisions of c. 138 or any of the conditions upon which an all alcoholic beverages restaurant license is ordinarily issued.

The fact that Playboy of Boston, Inc. is willing to do a certain amount of business on a credit basis by guaranteeing the charges of those customers who hold metal keys does not—in response to your remaining

questions—contravene any of the statutes of the Commonwealth. The corporation may freely choose to advance credit to its customers; this is a business decision, and is not subject to any provision of c. 138. Likewise, those parts of the franchise agreement which provide for participation in profits by Playboy Clubs International, Inc. represent only a method of compensating International for the granting of the franchise. The parties have chosen that such compensation shall be made on the basis of a percentage of profits, rather than by a single lump sum payment; this also is a business decision which is well within the discretion of the parties involved. It does not constitute the sale of alcoholic beverages in Massachusetts by Playboy Clubs International, Inc. (See my opinion to your Commission, dated December 17, 1965, on the subject of the dispensing of alcoholic beverages in the War Memorial Auditorium in Boston, in which the question of participation by another party in the profits of a licensee is fully discussed.)

It is therefore my opinion that Playboy of Boston, Inc.—despite its rather unusual application and “cover-charge” procedures—is not a “club” as that term is used in c. 138. Assuming that your Commission is otherwise satisfied with the application filed by Playboy of Boston, Inc., and that the corporation has complied with all other relevant statutes and regulations, your Commission has the legal authority to grant to Playboy of Boston, Inc. an all alcoholic beverages restaurant license under the provisions of § 12 of c. 138.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The authorization of technical and other assistance found in G. L. c. 15, § 11, inserted by St. 1965, c. 641, § 2, does not imply that the Department of Education may lawfully transfer funds to a municipality for the purpose of aiding pupil transportation plans, even in cases in which such plans have been developed to eliminate or to reduce racial imbalance.

The Department of Education may, under appropriate circumstances, recommend the transportation of pupils as a means of eliminating or reducing racial imbalance in the public schools. Assuming that no written protests have been lodged with the school committee under c. 71, § 37D, such transportation may lawfully be provided without violating any of the provisions of G. L. c. 71, § 68.

JANUARY 18, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—You have requested my opinion with regard to two questions concerning the interpretation of c. 641 of the Acts of 1965, entitled “An Act Providing For The Elimination Of Racial Imbalance In The Public Schools.” Your two questions are as follows:

“(1) May the Department of Education pay currently or reimburse

a city under the language 'and other assistance in the formulation and execution of plans' where transportation is provided in order to eliminate or reduce racial imbalance?

"If the answer is in the affirmative, what source would it come from and how would it be raised?

"(2) If the Board of Education were to recommend transportation of students under two miles or even over two miles, what effect would Chapter 71, Section 68 of the General Laws have on the transportation recommendations of the Board of Education under Chapter 641 of the Acts of 1965?"

In answer to your first question, it is my opinion that the quoted portion of G. L. c. 15, § 11, inserted by St. 1965, c. 641, § 2, was not intended to authorize payments to cities and towns as reimbursement for additional pupil transportation expenses created by the development of a plan under the said c. 641. It is clear from its context that the phrase "technical and other assistance" was intended to include only those services which the Department of Education might be able to render within the framework of its normal operations.

The Department could, for example, assist a municipality by helping to plan the most efficient placement of new schools, by computing the most convenient pupil transportation pattern or by acting as a clearing-house for information concerning new programs and experiments. The Department might also advise municipalities as to the availability of grants and other assistance from private universities and foundations. Such activities would conform closely with the regular operations of the Department, and would not constitute a new and separate program of state aid to municipalities.

It is significant to note that there already exist several extensive programs of educational aid for cities and towns. Yet, unlike the assistance referred to in the first paragraph of the new c. 15, § 11, all of these programs for financial aid are described and limited in considerable detail by the different provisions of law under which they are established. For examples of such state aid programs, see:

G. L. c. 70, §§ 1-10 (State program of general school aid);

G. L. c. 71, § 7A (Reimbursement of a portion of local pupil transportation expense);

G. L. c. 71, § 46E (State aid to provide higher salaries for teachers of mentally retarded children);

G. L. c. 71, § 78 (Reimbursement of a portion of expense of municipal junior college instruction).

Thus, in cases in which it has been the intention of the Legislature to authorize actual payments to municipalities, the General Court has evidenced such intention by the use of clear language and precise regulation of payments. Section 1 I itself contains a specific reference to payments to municipalities in its final paragraph (relating to the School Building Assistance Commission). The General Court ordinarily regulates the expenditures of state departments and agencies with great care,

and it is apparent that the Department of Education is no exception. I cannot assume that the Legislature has departed from this practice in this single instance. Accordingly, it is my opinion that the authorization of "technical and other assistance" does not imply that the Department may lawfully transfer funds to a municipality for the purpose of aiding pupil transportation plans, even in cases in which such plans have been developed to eliminate or to reduce racial imbalance.

Your second question relates to a possible conflict between the provisions of the so-called "Racial Imbalance Act" referred to above and those of § 68 of c. 71 of the General Laws. The latter section provides in part as follows:

" . . . If the distance between a child's residence and the school he is entitled to attend exceeds two miles and the nearest school bus stop is more than one mile from such residence and the school committee declines to furnish transportation, the department [of education], upon appeal of the parent or guardian of the child, may require the town to furnish the same for a part or for all of the distance between such residence and the school. . . ."

Consequently, each school committee is obliged to provide transportation for each student of the public schools of a given municipality who resides more than two miles from the school which he is entitled to attend, and more than one mile from the nearest school bus stop. As you indicate in your letter, no school committee is required under this section to provide transportation in cases in which a pupil resides at a location which is less than two miles from his school.

On the other hand, c. 641 of the Acts of 1965 implies that transportation of students is a device which may be used to combat racial imbalance. This indication appears in the statute in a negative form of provision ("No school committee or regional school district committee shall be required as part of its plan to transport any pupil to any school outside its jurisdiction or to any school outside the school district established for his neighborhood, if the parent or guardian of such pupil files written objection thereto with such school committee. . . ."); but it is clear that the Act contemplates the possible use of pupil transportation under certain circumstances. Thus, it would be entirely within the purview of the Act for the Department of Education to recommend—in appropriate situations—that pupils be transported as a means of reducing racial imbalance.

If in fact there is a conflict between the provisions of St. 1965, c. 641 which authorize your Department to recommend pupil transportation plans and the provisions of c. 71, § 68, such conflict may easily be reconciled. Chapter 71, § 68 is a general statute, applicable to all school committees and at all times. It states a continuing policy of the Legislature, *i.e.*, that pupils residing a great distance from the public school to which they have been assigned should not be compelled to furnish their own transportation. Chapter 641 of the Acts of 1965 is, on the other hand, designed wholly for the purpose of meeting a specific situation—the existence of so-called "racial imbalance" in the public schools of the Commonwealth.

It must be assumed that the General Court was aware of the existence of c. 71, § 68 when it enacted the more recent statute. Each act of the Legislature must be given effect in its proper sphere. As legislation designed to relate to a specific problem, St. 1965, c. 641 must control when actions intended to combat that problem are at issue.

It is, however, by no means necessary to assume that a conflict of provisions exists. General Laws c. 71, § 68 states only that school committees shall be required to furnish transportation in certain specific instances. The statute in no way prohibits school committees from choosing to provide transportation at other times as well. A minimum requirement alone is stated, and nothing appears which would in any way compel a school committee to withhold transportation in cases in which pupils resided less than two miles from their school. (Several communities within the Commonwealth do in fact presently provide such a service.)

Accordingly, there is nothing to indicate that each of the statutes in question may not be fully implemented. The Department of Education may—under appropriate circumstances—recommend the transportation of pupils as a means of eliminating or reducing racial imbalance in the public schools. Assuming that no written protests have been lodged with the school committee under c. 71, § 37D, such transportation may lawfully be provided without violating any of the provisions of c. 71, § 68.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

No racing dates may be awarded by the State Racing Commission prior to local approval of a racing site, and, after the expiration of six years from the time of a particular approval, the location must again be so approved before the commission shall grant a license for a racing meeting in said town.

The State Racing Commission cannot grant conditional racing dates contingent upon the successful completion of the local approval process. The authority to award dates on such an unusual basis must be granted by specific statutory language, and cannot be vested in the Commission solely by implication.

JANUARY 19, 1966.

HON. PAUL F. WALSH, *Chairman, State Racing Commission*.

DEAR MR. WALSH:—The State Racing Commission has requested my opinion with respect to an application for racing dates filed on January 4, 1966, by Berkshire Downs, Inc. This corporation desires to conduct a racing meeting on property owned by it in the Town of Hancock, Berkshire County, a location formerly known as Rabouin Farm. Berkshire Downs, Inc. has conducted racing meetings at this location pursuant to licenses issued by your Commission from the year 1960 through the year 1965.

Your letter relates primarily to the provisions of G. L. c. 128A, § 13A,

and to their application to the present request by Berkshire Downs, Inc. The second paragraph of this section, inserted by c. 437 of the Acts of 1948, provides as follows:

"... Provided, nevertheless, that in the case of towns said approval by the selectmen, excepting only the approval of locations where racing meetings have already been held, other than in connection with state and county fairs, prior to May first, nineteen hundred and forty-eight, shall not become effective *unless and until it shall be ratified and confirmed by vote*, taken by Australian ballot, of a majority of the registered voters of said town voting at the next annual election. In the event that a location of a race track has been disapproved by the town officials or at a town election as aforesaid, no petition for approval of the same location shall be received by town authorities and no hearing shall be held on the question of approving or disapproving of the same location for a period of three years from the date of disapproval. *Said approval by the selectmen of the location of a race track, excepting only the approval of locations where racing meetings have already been held, other than in connection with state and county fairs, prior to May first, nineteen hundred and forty-eight, shall be effective for a period of six years at the expiration of which time the location shall again be so approved before the commission shall grant a license for a racing meeting in said town.*" [Emphasis supplied.]

Since racing was not conducted at this location prior to May 1, 1948, it is clear that approval of the location, as required in the paragraph quoted above, is a condition precedent to the lawful awarding of racing dates.

You have provided the following facts relative to the present application for dates and to previous approvals of the location in question. The property owned by Berkshire Downs, Inc. was first approved for racing by the Board of Selectmen of Hancock on January 20, 1953, following a public hearing held the previous day. On February 2, 1953, a majority of the registered voters of the Town of Hancock voted to ratify and confirm the approval by the Selectmen of the location in question.

Pursuant to the second paragraph of c. 128A, § 13A, the Board of Selectmen of Hancock again considered the question of approval of the Berkshire Downs location early in 1959. The Board again approved the location on January 23, 1959; this approval was likewise ratified by the voters at the Town Election on February 2, 1959. This is the last recorded approval of the Berkshire Downs location.

On January 4, 1966, Berkshire Downs, Inc. filed the application for racing dates which is the subject of your request. You have informed me that your Commission called to the attention of the corporation's representative the fact that—under c. 128A, § 13A—the 1959 approval of location was no longer effective. The applicant has now taken steps to secure new approval of the site. The Board of Selectmen of Hancock will give the required seven-days' notice, and will hold a public hearing on the question of approval in the very near future. The Town Election, at which the voters will have the opportunity to ratify or reject approval by the Selectmen (assuming that such approval is granted) is scheduled to be held on February 8, 1966. Your Commission must, however, under

the provisions of G. L. c. 128A, § 2, take action upon this application on or before January 30, 1966.

You have indicated in your letter that in all probability approval by the Board of Selectmen of Hancock will be granted before January 30, 1966, and that the Selectmen's approval will be ratified by the voters at the Town Election of February 8, 1966. Assuming that such approval and ratification will actually occur, and considering the facts set forth above, you have asked the following questions:

"(1) Is the application of Berkshire Downs, Inc. for license to conduct a running horse racing meeting in the Town of Hancock during the calendar year of 1966 eligible for consideration by the Commission in the awarding of 1966 racing dates?

"(2) Is it permissible for the Commission, if it sees fit, to grant a conditional license to Berkshire Downs, Inc. for racing dates for the year of 1966. The condition of the license to be set forth in the vote of the Commission among other conditions that the Commission may determine that the voters of the Town of Hancock shall ratify the approval of the Selectmen, if said Selectmen approve the site before January 30th, 1966, at the annual town election in early February 1966—otherwise the license to be null and void. The license certificate not be issued until all conditions are met."

Prior to 1948, c. 128A, § 13A required that locations of race tracks be approved *once* by the Mayor and Aldermen or by the Selectmen. Such approval having been given, it was beyond the power of these executive authorities to revoke or withdraw it.

North Shore Corporation v. Selectmen of Topsfield,
322 Mass. 413, 417

By St. 1948, c. 437, the General Court added additional requirements with respect to approval by boards of selectmen. Such approval would now no longer become effective *unless and until* it was ratified by a vote of a majority of the registered voters of the town at the next annual election. In addition, the said approval, as ratified, would no longer be valid indefinitely; "said approval . . . shall be effective for a period of six years at the expiration of which time the location shall again be so approved before the commission shall grant a license for a racing meeting in said town."

Both the language and the purpose of the new paragraph indicate that the Legislature contemplated both approval by the Selectmen and ratification by the registered voters every six years. The act of ratification by the voters has been made an integral part of the approval process; approval is not complete without it, and cannot be effective until such ratification has been accomplished. Likewise, the purpose of the amendment is served solely by requiring such voter ratification at each approval period.

". . . The dominant purpose of the statute was to give the registered voters in towns the right to say whether the approval of the selectmen should be ratified or rejected. . . ."

Selectmen of Topsfield v. State Racing Commission,
324 Mass. 309, 313

Such control by the registered voters of the town is not possible if they are to be limited solely to ratification or rejection of the first approval by the Board of Selectmen. Nor will the legislative intent be effectuated if approval by the Selectmen is given some legal status prior to action by the voters. The voters must—in order to effectuate the purpose of this amendment—be permitted to express themselves on the merits of each approval.

The last approval by the Board of Selectmen of Hancock, and ratification thereof, occurred early in 1959. Such approval was effective, under § 13A, until February 2, 1965. The 1959 approval had therefore expired prior to the filing of the present application. Neither Berkshire Downs, Inc. nor the Selectmen themselves had initiated new approval proceedings.

The statute is—in my opinion—clear to the effect that no racing dates may be awarded by your Commission prior to local approval of the racing site. After the expiration of six years from the time of a particular approval, the location must “again be so approved *before* the commission shall grant a license for a racing meeting in said town.” [Emphasis supplied.] Since prior approval of the location in question has now expired, and since no new approval has been effected, your Commission cannot, at this time, lawfully award dates for racing to be conducted at this location.

Nor do I believe, in response to your second question, that the State Racing Commission may grant conditional dates contingent upon the successful completion of the local approval process. Chapter 128A of the General Laws contains no provisions which authorize the conditional awarding of racing dates. Furthermore, it is provided in § 2 of the chapter that “the commission shall grant or dismiss (applications) not later than the thirtieth day of January. . . .” The General Court has—by insertion of this specific cut-off date—indicated that action upon all applications is to be completed within a given period of time. This is not possible if conditional dates have been awarded. It is apparently the purpose of the Legislature to ensure that final decisions as to the awarding and withholding of dates be made by January 30 of each calendar year. The authority to award dates on such an unusual basis must, in my opinion, be granted by specific statutory language, and cannot be vested in the State Racing Commission solely by implication.

I am familiar with the decision rendered in 1965 by the Massachusetts Supreme Judicial Court in the case of *Almeida Bus Lines v. Department of Public Utilities*, 1965 Mass. Adv. Sh. 55, in which the Court concluded that an agency could lawfully enter an order “*nunc pro tunc*.” There is, however, a substantial difference between the situation which was at issue in *Almeida*, and that which is the subject of this opinion. In *Almeida*, the Court ruled that the agency could lawfully affix a prior date to its order so that the time spent by it in resolving the matter would not prejudice the prevailing party. In the present case, it is not the date of an order of the State Racing Commission which is at issue; rather, it is the effective date of a local election. Neither the language of *Almeida* nor the theory

upon which that decision is based warrants the conclusion that the effective date of an election—as opposed to the date of an order entered by a quasi-judicial agency—may be varied. It appears that, in a community such as Hancock, in which the annual election is held after the January 30 date of termination of the State Racing Commission, the process of approval would have to be completed in the year prior to that in which a given application is to be filed. The effectuation of both section 2 and section 13A of Chapter 128A compels this result.

It is apparent—based on the facts you have provided—that the property of Berkshire Downs, Inc. is not presently approved for racing purposes. Such approval cannot be completed until February 8, 1966, a date subsequent to the time by which your Commission must make its final decisions with regard to the licensing of racing meetings. Your Commission cannot award racing dates to Berkshire Downs, Inc. on or before January 30, 1966; neither can it make a conditional award of dates contingent upon ultimate local approval of the site. Accordingly, it is my opinion that the application filed by Berkshire Downs, Inc. on January 4, 1966, must be dismissed.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Land sales and abandonments by the Metropolitan District Commission must, under the provisions of c. 92, § 85, be approved by the Governor, but need no longer be approved by the Executive Council.

JANUARY 31, 1966.

HON. KEESLER H. MONTGOMERY, *Executive Secretary, Executive Council*.

DEAR SIR:—In your letter of January 6, 1966, you stated the following:

“The Executive Council has directed me to request from you an opinion as to the meaning of General Laws, Chapter 92, Section 85, specifically, with reference to the power of the Council to entertain such question, in the light of Chapter 740 of the Acts of 1964.”

I gather from this that you desire an opinion as to whether the consent of the Executive Council is still required in order to confirm the sale or abandonment by the Metropolitan District Commission of certain public lands in light of the provisions of St. 1964, c. 740 [“An Act Repealing Statutory Powers of the Governor’s Council Which Interfere With The Efficient Operation of the Executive Department of the Commonwealth.”]

General Laws c. 92, § 85 provides in part as follows:

“If the [metropolitan district] commission votes, under this or the preceding section, to abandon or sell any portion of the lands or rights in land so taken or acquired by it, and the park commissioners in any town where said property or right in property is situated refuse or fail to concur with the commission within fourteen days from the giving of written notice of such vote to said park commissioners, the commission,

upon written notice of not less than seven days to said park commissioners, may appear before the governor and council and ask their concurrence in such sale or abandonment; *and if the governor and council, after hearing, concur in such sale or abandonment it shall have full force and effect.*" [Emphasis supplied.]

Thus, "concurrence" by the Governor and Council in such sales or abandonments is required only when the park commissioners of a municipality in which the land in question is located have failed or have refused to agree to the sale or abandonment themselves.

The enactment of c. 740 of the Acts of 1964 repealed most of the statutory powers of the Executive Council [see *Barnes v. Secretary of the Commonwealth*, 1965 Mass. Adv. Sh. 441]. Section 4 of the statute provides:

"... so much of each provision of the General Laws and of any special law as requires the advice and consent of the council with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department, including without limitation, any deposit, borrowing, loan, investment, endorsement, validation, surety or bond, or any lease, license, purchase, acquisition, *sale*, conveyance, *disposition or transfer*, or any contract or other agreement, or any permit or license, or any rules or regulations, is hereby repealed." [Emphasis supplied.]

This repeal does not extend to certain specific statutory powers enumerated in § 2 of the Act, none of which relates to c. 92, § 85 in any way. Neither does the repeal reach constitutional powers of the Executive Council (see *Barnes, supra*, at page 443); but I know of no provision of the Constitution of this Commonwealth which requires that the Executive Council approve the sale or abandonment of public land.

The language of St. 1964, c. 740, § 4 quoted above makes it abundantly clear that the authority formerly vested in the Executive Council under c. 92, § 85 no longer exists. It has been the function of the Council under this section to examine land sales and abandonments recommended by the Metropolitan District Commission, and to determine whether such sales and abandonments should be approved. This clearly represents "advice and consent of the council with respect to any action . . . by any . . . agency . . . in the executive department . . ." as referred to in § 4, and accordingly is a function no longer vested in the Executive Council. Even were c. 92, § 85 to be interpreted so as to vest in the Governor primary authority to approve land sales and abandonments of the Metropolitan District Commission, leaving the Council with simply the responsibility to advise the Governor on this matter, the Council's function has still been eliminated ["... so much of each provision of the General Laws . . . as requires the advice and consent of the council with respect to any action . . . by the governor . . . is hereby repealed." *St. 1964, c. 740, § 4.*]

Accordingly, it is my opinion that land sales and abandonments contemplated by the Metropolitan District Commission must, under the

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provisions of c. 92, § 85, be approved by the Governor, but need no longer be approved by the Executive Council.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A city or town may, pursuant to G. L. c. 143, § 3, regulate the construction of school buildings to the extent of imposing "further" regulations, that is, restrictions not covered in the regulations of the Board of Schoolhouse Structural Standards, but, if any provision of a municipal code is in conflict with the Board's regulations, the latter must apply.

The requirements for the issuance of a permit, inspection by the local inspector and the payment of a fee are not negated by the powers conferred upon the Board by St. 1964, c. 546 and St. 1960 c. 596.

The requirements apply equally to public and private schools.

FEBRUARY 4, 1966.

MRS. RUTH MOREY, *Chairman, Board of Schoolhouse Structural Standards, Department of Public Safety.*

DEAR MRS. MOREY:—In your letter of December 3, 1965, you state:

"This Board, as required by Chapter 675, Acts of 1955, and 596, Acts of 1960, as amended by Chapter 546, Acts of 1964, does in effect provide for the construction of *public and private* schoolhouse structures. . . ."

I assume that the words "does in effect provide for" mean "has adopted regulations for," as contemplated by St. 1964, c. 546, § 2 (amending St. 1955, c. 675, § 2). In view of this information and other legal provisions quoted in your letter (which need not be repeated), you ask:

"1. Which code prevails—municipal or town code, or Board of Schoolhouse Structural Standards Code?

"2. If the Board of Schoolhouse Structural Standards code prevails, does this negate the requirements for: (a) the issuance of a permit; (b) inspection by the local inspector; (c) payment of a fee?

"3. In this regard, do these requirements apply equally to public and private schools?"

I assume that the first question should be read as if the words "in the construction of schoolhouses" were included after the word "prevails." In view of St. 1960, c. 596, § 1, the Board clearly has authority to make regulations "relating to structural safety and prevention of fire in connection with the construction, reconstruction, and alteration or remodeling of all public and private schoolhouses and relating to the standards of materials to be used therein." On the other hand, G. L. c. 143, § 3 confers upon cities (unless restricted by their charter or by special laws) and towns the power to "regulate the inspection, materials, construction, alteration, repair, demolition, removal, height, area, location and use . . . of buildings and other structures within its limits;

except such as are owned and occupied by the United States, or owned or occupied by the commonwealth or by any county, and except bridges, quays and wharves." Thus, it might appear that both cities and towns and the Board have been given authority to establish regulations for the construction of schoolhouses (except for such schoolhouses as may be owned by the United States, the Commonwealth or a county).

However, G. L. c. 143, § 3 also contains a paragraph which states:

"Nothing in this chapter shall be construed as prohibiting any city or town in which the provisions of this section are in force, but subject, however, in the case of a city to the provisions of any special law relative thereto, from imposing, by ordinance or by-law, further restrictions, in accordance with the generally accepted standards of engineering practice and not inconsistent with law, relative to any building or other structure within its limits which is subject to this section; *but no such city or town shall have power to minimize, avoid or repeal any provision of this chapter.*" [Emphasis supplied.]

Although neither St. 1964, c. 546, § 2 nor St. 1960, c. 596, § 1 is literally a "provision" of G. L. c. 143, both the 1964 and 1960 enactments confer authority upon the Board to be exercised in conjunction with certain sections of c. 143. Thus, St. 1964, c. 546, § 2 provides as follows:

"Section 2 of said chapter 675, as most recently amended by section 2 of said chapter 457, is hereby further amended by striking out, in line 4, the word 'nine' and inserting in place thereof the word:—twelve,—so as to read as follows:—Section 2. The regulations issued under section fifty-four of chapter one hundred and forty-three of the General Laws shall, in so far as they pertain to schoolhouses, be issued for a period of twelve years by the board of schoolhouse structural standards, any provisions of said section to the contrary notwithstanding."

And St. 1960, c. 596, § 1 states:

"In issuing a certificate for the approval of the erection or alteration of a schoolhouse under section fifteen of chapter one hundred and forty-three of the General Laws, a supervisor of plans shall, in addition to any other requirements of said chapter, determine that the plans and specifications required to be filed under said section fifteen conform to the rules and regulations made under this section. . . ."

I treat St. 1964, c. 546, § 2 as if it were part of G. L. c. 143, § 54, which authorizes regulations for the uniform enforcement of §§ 15 to 52 inclusive; and I treat St. 1960, c. 596, § 1 as if it were part of G. L. c. 143, § 15, which provides that plans for certain public buildings shall be filed with and approved by a supervisor of plans in the Department of Public Safety of the Commonwealth. Such treatment is indicated in view of the temporary nature of the Board's existence (St. 1964, c. 546, § 1), because of which the Legislature doubtless did not include any provisions relating to the Board in G. L. c. 143. See "Sutherland Statutory Construction (3rd Ed.)" § 4829. I conclude that a city or town may, pursuant to G. L. c. 143, § 3, regulate the construction of school

buildings to the extent of imposing "further" restrictions (*i.e.*, restrictions not covered in the regulations of the Board) but that, if any provision of a municipal code is in conflict with the Board's regulations, the latter must apply. A contrary ruling would permit a city or town to "minimize, avoid or repeal" a provision of G. L. c. 143 and would frustrate the clear legislative intent of St. 1950, c. 596, that the Board provide "reasonable uniform requirements of safety" throughout the Commonwealth. [Emphasis supplied.]

Your second question relates to whether the provisions of G. L. c. 143, § 3 (already quoted) for the licensing and inspection of schoolhouse construction by local authorities and for assessing a local licensing fee are negated by the powers given to the Board by St. 1964, c. 546 and St. 1960, c. 596. At a time when the powers now exercised by the Board were largely exercised by the Metropolitan District Police (see St. 1913, c. 655; cf. St. 1943, c. 544), the Supreme Judicial Court considered this precise question and squarely held that a city "might lawfully make" requirements for obtaining a permit to build a schoolhouse and for "payment of a fee in obtaining such a permit." *M. Spinelli & Sons, Inc. v. Cambridge*, 306 Mass. 342, 343. Since the language in G. L. c. 143, § 3 relevant to the Court's decision has since been re-enacted in substantially the same form, it may be assumed that the Legislature approved of the Court's interpretation. *Commonwealth v. Benoit*, 346 Mass. 294, 297 and cases cited. In any event, I see nothing in St. 1964, c. 546 (or any of its predecessors, *e.g.*, St. 1955, c. 675) or in St. 1960, c. 596 that derogates from the powers of cities and towns clearly spelled out in G. L. c. 143, § 3. Since one of these powers is inspection, I am of opinion that, although this power was not in issue in the *Spinelli* case, *supra*, it has not been taken from local authorities. My answer, therefore, to all parts of your second question is "No."

In response to your third question, I see no reason why the powers of the Board or of the cities and towns do not apply equally to the construction of private as well as of public schools. The entire statutory scheme evidences an explicit legislative intent that public and private school construction should be subject both to the provisions of G. L. c. 143 and to the regulations of the Board. Section 1 of c. 143 defines a public building as "any building or part thereof used as a public or private . . . schoolhouse," while § 15 applies to any "building which is designed to be used . . . in whole or in part, as . . . a public or private school." On the other hand, the provisions of St. 1960, c. 596, § 1 (already quoted) confer authority upon the Board to make regulations for the construction of "all public and private schoolhouses." In my opinion, the answer to your third question is "Yes."

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A bequest to the John Birch Society would qualify for exemption under c. 65, § 1 M.G.L., if it is found that the Society is an organization whose property is generally free from taxation under G. L. c. 59, § 5. This is fundamentally a factual determination which must be made by the Commissioner of Corporations and Taxation, subject of course to judicial review upon petition by an aggrieved party.

FEBRUARY 7, 1966.

HON. GUY J. RIZZOTTO, *Commissioner, Department of Corporations and Taxation.*

DEAR COMMISSIONER RIZZOTTO:—You have requested my opinion as to whether a legacy, under the will of a Massachusetts decedent, to the John Birch Society, a corporation organized in Massachusetts under G. L. c. 180, is a bequest “to or for the use of charitable, educational or religious societies or institutions” which would qualify for an exemption under G. L. c. 65, § 1.

General Laws c. 65, § 1 provides, in material part, that:

“All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein belonging to inhabitants of the commonwealth, . . . which shall pass by will, . . . except (1) to or for the use of charitable, educational or religious societies or institutions . . . shall be subject to a tax. . . .”

The test for applying the exemption under G. L. c. 65, § 1 is whether the society or institution is one whose property is generally exempt from taxation under G. L. c. 59, § 5. *First Universalist Society in Salem v. Bradford*, 185 Mass. 310; *Carroll v. Commissioner of Corporations and Taxation*, 343 Mass. 409.

General Laws c. 59, § 5, cl. 3 provides, in material part, that: “The following property . . . shall be exempt from taxation: . . . Third, Personal property of a charitable organization, which term, as used in this clause, shall mean (1) a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth . . . and real estate owned . . . and occupied by it . . . ; provided, however, that:—(a) If any of the income or profits of the business of the charitable organization is divided among the stockholders, the trustees or the members, or is used or appropriated for other than literary, benevolent, charitable, scientific or temperance purposes, its property shall not be exempt. . . .”

However, the exemption clause in c. 65, § 1 does not find in G. L. c. 59, § 5 the counterpart which its language would lead one to expect. There is no clause in c. 59, § 5 specifically exempting the property of “charitable, educational or religious societies or institutions” from taxation. However, G. L. c. 59, § 5, cl. 3 has been applied to charitable and educational societies or institutions as those terms are used in G. L. c. 65, § 1. *First Universalist Society in Salem v. Bradford*, 185 Mass. 310. The John Birch Society¹ is within the class of a “charitable, educational . . . [society] . . . organized under the laws of . . . the commonwealth.” G. L. c. 65, § 1. The word “charitable” has been defined in very broad terms.

Jackson v. Phillips, 14 Allen 539, 556 quoted in *Parkhurst v. Treasurer & Receiver General*, 228 Mass. 196, 199. A college has been held to be a charitable institution and likewise its alumni association. *New England Trust Co. v. Commonwealth*, 327 Mass. 113. An organization founded to educate the public as to the evils of war was also found to be a charitable institution. *Parkhurst v. Treasurer & Receiver General*, *supra*. In fact, it is questionable whether the word "educational" has any real meaning because "charitable" has been defined in terms broad enough to include educational purposes. In any event, the John Birch Society is within the class of a "charitable educational . . . [society]" under G. L. c. 65, § 1, and a bequest to it is on its face within the exemption of G. L. c. 65, § 1. However, the exemption depends upon this question: Is the society one whose property is generally exempt from taxation under G. L. c. 59, § 5?

¹The records of the Secretary of the Commonwealth show that the said Society was incorporated December 23, 1958 as a Chapter 180 corporation, whose corporate purpose has been set forth in its papers as:

"To promote civic interest in national and international affairs by an educational program and collection of literature and dissemination of the same for educational purposes; and to do any and all things which may be necessary and incidental to the foregoing and in general to do all other things which may be legally permitted to this corporation by Massachusetts General Laws, Chapter 180, and acts in amendment thereof and in addition thereto."

The criteria under c. 59, § 5 are " . . . the language of its [the society's] charter or articles of association, constitution and by-laws. . . . the objects which it serves and the method of its administration' (*Little v. Newburyport*, 210 Mass. 414, 415), that is, ' . . . its purposes declared and the work done.' *Parkhurst v. Treasurer & Receiver General*, 228 Mass. 196, 199-201." *Assessors of Boston v. Garland School of Home Making*, 296 Mass. 378, 384. *Carroll v. Commissioner of Corporations and Taxation*, 343 Mass. 409, 410. *Massachusetts Medical Society v. Assessors of Boston*, 340 Mass. 327, 332.

There may very well be charitable or educational societies none of whose property is exempt, namely, societies where "any of the income or profits of the business of the charitable organization is divided among the stockholders, the trustees or the members, or is used or appropriated for other than literary, benevolent, charitable, scientific or temperance purposes." G. L. c. 59, § 5, cl. 3. These societies would not be exempt from taxation under G. L. c. 59, § 5, cl. 3 and therefore would not be exempt from an inheritance tax under G. L. c. 65, § 1.

Accordingly, resolution of the problem you have posed depends upon a determination whether the John Birch Society is that type of "charitable, educational . . . [society] . . ." whose personal and real estate is generally exempt from taxation under G. L. c. 59, § 5, or is an organization none of whose property is exempt because of certain activities engaged in by it. This is fundamentally a factual determination which must be made by the Commissioner of Corporations and Taxation, subject of course to judicial review upon petition by an aggrieved party. Absent such a factual determination, I am able to advise you only that a bequest to the John Birch Society would qualify

for exemption under c. 65, § 1 if it is found that the society is an organization whose property is generally free from taxation under c. 59, § 5.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

G. L. c. 112, § 81 (1) applies only to persons who have applied for licenses in this Commonwealth, and does not apply to persons whose licenses are pending in the other states. One awaiting licensure in another state cannot practice professional or practical nursing in this state regardless of Massachusetts residence, unless she applies for licensure in the Commonwealth.

A practical nurse licensed in another state after withdrawal from nursing school (in accordance with provisions comparable to St. 1956, c. 371, § 2) may be reciprocally licensed in Massachusetts.

FEBRUARY 9, 1966.

MISS WINIFRED V. SHUMAN, R.N., *Executive Secretary, Board of Registration in Nursing*.

DEAR MISS SHUMAN:—You have requested my opinion as to the scope of G. L. c. 112, § 81. You state that you “receive numerous inquiries from prospective [nursing] graduates located in other states who plan to apply for registration in the other state, write the examination there, and then become employed in Massachusetts” and that the persons making these inquiries apparently do “not plan to become registered” in this Commonwealth. In view of these inquiries, you ask the following questions:

“1. Is subsection (1) of section 81 applicable to the person whose license is pending in the other state?

“2. If not, can we state in our interpretation that the new graduate, awaiting licensure in the other state, cannot practice professional or practical nursing in this state regardless of Massachusetts residence, unless she applies for licensure in this state?”

Section 81 of G. L. c. 112 exempts from the operation of statutes forbidding unlicensed professional or practical nursing (*inter alia*) “any graduate of any school for nurses or practical nurses duly approved in accordance with this chapter, during the period from such person’s graduation until announcement of the results of the first licensing examination for registered nurses or licensed practical nurses, as the case may be, thereafter held in accordance with this chapter.” The statute, by its bare language, would appear to allow any graduate of an approved nursing school to practice until the results of the first examination after graduation are announced. Despite this broad language, however, it would appear that the intention of the Legislature was to allow graduates of approved nursing schools (see G. L. c. 112, §§ 81A-81C) to practice until they have shown at the earliest possible time, by failing an

examination given by the Board (G. L. c. 112, § 74A), that they do not meet the nursing standards established in this Commonwealth. It would be inconsistent with this statutory intention to permit a person to practice nursing until the announcement of the results of the first examination held after her graduation from nursing school, where such person has not applied to take that examination. Furthermore, exceptions to statutes establishing general qualifications for the practice of a profession are to be strictly construed. Crawford, *STATUTORY CONSTRUCTION*, § 358 and cases cited in n. 60. See *Commonwealth v. S. S. Kresge Co.*, 267 Mass. 145, 149.

Whether a person has applied for a nursing license or taken an examination in another jurisdiction is irrelevant, since such examinations are not "held in accordance with this chapter [G. L. c. 112]." I conclude that the exemption of G. L. c. 112, § 81(1) applies only to persons who have applied for licensure in this Commonwealth and that the first question should be answered "No." As I am aware of no reason why the Board may not interpret G. L. c. 112, § 81 in accordance with this opinion and communicate that interpretation to any interested person, the answer to the second question is "Yes."

You also ask several questions as to the interpretation of St. 1956, c. 371, § 2 (amended in a manner not relevant to this opinion by St. 1959, c. 415, § 4). Chapter 371, § 2 reads:

"Notwithstanding any contrary provision of section seventy-four A of chapter one hundred and twelve of the General Laws, any person of good moral character, who is at least nineteen years of age and who furnishes satisfactory proof that he was a student in an approved school for nurses located within the commonwealth and was at the time of his withdrawal therefrom in good standing and that he received therein theoretical instruction and clinical experience equivalent to that required for graduation from schools for practical nurses which are approved by the approving authority established by section fifteen A of chapter thirteen of the General Laws shall, upon application and upon the payment of five dollars, be examined by the board of registration in nursing, and, if found qualified, shall be licensed as a practical nurse as provided in said section seventy-four A."

I shall not repeat the questions verbatim. In essence, you ask whether a practical nurse licensed in another state after withdrawal from nursing school (in accordance with provisions comparable to St. 1956, c. 371, § 2) may be reciprocally licensed in Massachusetts. Relevant to this question is G. L. c. 112, § 76, which states:

"The board may register or license in like manner, without examination, any person who has been registered as a nurse or licensed as a practical nurse, as the case may be, in another state under laws which, in the opinion of the board, maintain standards substantially the same as those of this commonwealth for nurses or for practical nurses, as the case may be. The fee for registration or licensing without examination under this section shall be ten dollars."

It is conceivable that other states may license as practical nurses persons who (a) have withdrawn from approved (see G. L. c. 143, §§ 81A

and 81B) schools for professional nursing after satisfactory completion of so much of the professional nursing course as would comprise a course in practical nursing; and (b) have passed an examination of similar difficulty to the examination in practical nursing given in this Commonwealth; and (c) have met the requirements of competence, training, citizenship and character imposed upon practical nurses by the laws of Massachusetts. Such states obviously "maintain standards substantially the same as those of this commonwealth . . . for practical nurses" and, in general, I see no reason why practical nurses licensed in such states should not be eligible to be licensed here under G. L. c. 112, § 76.

I am aware that St. 1956, c. 371, § 2 applies only to "an approved school for nurses *located within the commonwealth.*" [Emphasis supplied.] This language apparently has suggested to the Board that the provisions of G. L. c. 112, § 76 notwithstanding, persons licensed in other states pursuant to statutes comparable to St. 1956, c. 371, § 2 may not be licensed in Massachusetts unless they attended a school located here. The failure to include the provisions of St. 1956, c. 371, § 2 in the General Laws (in view of the fact that the statute's effectiveness is neither temporally nor geographically restricted) "suggests an intention that § 2 have a limited application." *Vaughan v. Max's Market, Inc.*, 343 Mass. 394, 397. Thus, if there were any conflict between the provisions of G. L. c. 112, § 76 and St. 1956, c. 371, I should be inclined to regard the former as controlling.

However, G. L. c. 112, § 76 and St. 1956, c. 371, § 2 are *in pari materia* and should be interpreted "to the end that there may be an harmonious and consistent body of law" with "reasonable effect to both [statutes], unless there be some positive repugnancy between them." *Everett v. Revere*, 344 Mass. 585, 589 and cases cited. Applying this rule of statutory construction to the question now before me, I conclude that St. 1956, c. 371, § 2 permits persons not licensed anywhere or persons licensed in states that do not meet the Massachusetts standards for practical nurses to take the examination pursuant to c. 371, § 2 only if the nursing school from which they have withdrawn is one "approved" by the Board and "located within the Commonwealth." (This conclusion applies, of course, only to persons seeking examination and licensure under St. 1956, c. 371, § 2 and not to applicants generally.) I also conclude, however, that persons licensed in states which *do* meet Massachusetts standards for practical nurses should not be denied reciprocal licensure under G. L. c. 143, § 76 merely because they have attended schools outside of the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

Relative to procedures which should be followed in obtaining authorization for surgery on certain mentally incompetent patients committed to institutions of the Department of Mental Health pursuant to G. L. c. 123, §§ 51, 66, 69, 100, 101, 104 or 105.

FEBRUARY 9, 1966.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR COMMISSIONER SOLOMON:—You have requested my opinion as to the procedures which should be followed in obtaining authorization for surgery on certain patients committed to institutions of the Department of Mental Health pursuant to G. L. c. 123, §§ 51, 66, 69, 100, 101, 104 or 105. It may be assumed that the patients concerned are not mentally competent to give permission for surgery and that a physician has determined that a surgical operation may “prolong the life expectancy of [such] patient, and/or . . . be a factor in successful care and treatment.” From your statement that “such surgery might not come within the area of life or death,” I assume that your request is directed at clarification of procedures in circumstances that do not constitute an emergency.

Implicit in your letter is the assumption that legal consent is necessary before surgery may be performed on any person. This assumption is correct. *Purchase v. Seelve*, 231 Mass. 434, 437. *Reddington v. Clayman*, 334 Mass. 244, 246-247. Cf. *Jackovach v. Yocum*, 212 Iowa 914, 925 and cases cited, and *Luka v. Lowrie*, 171 Mich. 122, 132-133, (consent unnecessary or implied as a matter of law in case of emergency surgery). I shall not repeat the questions of your letter verbatim. In essence, you ask my opinion as to who may give consent to non-emergency surgical operations on patients who are mentally incompetent to decide for themselves whether such operations should be performed.

If a patient has not attained his majority and is unmarried, the consent of his parents, as natural guardians, is necessary. *Reddington v. Clayman*, *supra*. See 70 C.J.S. 986. If either parent is dead, the permission of the surviving parent should be sufficient. G. L. c. 201, § 5. See *Nightingale v. Withington*, 15 Mass. 271, 274. If the child is illegitimate, the mother is guardian and only her consent is needed. *Wright v. Wright*, 2 Mass. 109, 110. *Commonwealth v. Hall*, 322 Mass. 523, 528. But Cf. G. L. c. 190, § 7 legitimizing children born out of wedlock after marriage of the natural parents and acknowledgment by the father. The weight of opinion is that at common law upon the mother's death, the putative father becomes the guardian of an illegitimate child. See 65 L.R.A. 689 and cases cited in note V(c) on p. 696. If the Probate Court has entrusted guardianship over the child's person to anyone, whether parent, relative or stranger, and whether by virtue of the divorce, separation, death or unfitness of the natural parents, the consent of that guardian should be obtained. G. L. c. 119, § 23(c) and (e); c. 201, § 5; c. 208, § 28. Adoptive parents have the same rights with respect to those whom they adopt as the natural parents had prior to adoption. *Bottoms v. Carlz*, 310 Mass. 29, 33.

The Supreme Judicial Court of this Commonwealth, it would appear, has not had occasion to decide whether grandparents are the “natural” guardians of children whose parents are deceased. (See *Petition for*

Revocation of a Decree for Adoption of a Minor, 345 Mass. 663, 671. Cf. *Merrill v. Berlin*, 316 Mass. 87, 89-90.) Where the question has arisen in other jurisdictions, the decisions have been conflicting. See *In re Mendellsobins Adoption*, 39 N.Y.S. 2d 384, 387. Cf. *In re Guardianship of Lehr*, 249 Iowa 625, 636. In view of the liabilities that may result from performance of an unauthorized operation, I am of opinion that the consent of a court-appointed guardian should be obtained for surgery to be performed on any mentally incompetent minor who has no parents and no spouse. I shall discuss the procedures for appointment of a guardian later in this opinion.

Although a person is not the "guardian" of a mentally incompetent spouse unless formally appointed by the Probate Court (see *Ryder v. Ryder*, 322 Mass. 646, 648), the common law appears to be that a patient's husband or wife is the appropriate person to give consent to a surgical operation where the patient is incompetent. *Pratt v. Davis*, 224 Ill. 300, 305-306. *Barnett v. Bachrach*, 34 A. 2d 626, 627 (D. C. Mun. App.). *Rishworth v. Moss*, 159 S.W. 122, 125 (Tex. Civ. App.). See *Denny v. Tyler*, 3 Allen 225, 227. Cf. *State, Use of Janney v. Housekeeper*, 70 Md. 162, 170 (consent of husband unnecessary when wife is competent). If, however, the patient's spouse is missing or incompetent, the appointment of a guardian, for a husband under G. L. c. 201, § 6 and for a wife under G. L. c. 201, § 24, is advisable; the consent of that guardian for surgery upon the ward should then be obtained.

The commitment of a person to an institution for the mentally ill is "not equivalent to the appointment of a guardian over" that person. *Mitchell v. Mitchell*, 312 Mass. 165, 168. Permission to perform surgery on any patient incompetent to decide for himself whether to undergo such surgery requires the permission of that patient's guardian. *Lawyers' Medical Cyclopedia*, § 2.15. *Reinstatement of the Law of Torts*, § 59 (2). I have already discussed the circumstances in which the appropriate "guardian" is the patient's parents or spouse. In other circumstances, the guardian of a mentally ill person is formally appointed by the Probate Court. G. L. c. 201, § 6.

When a guardian has been appointed, the Probate Court is required by the statute to send "a copy of such appointment" to the Department of Mental Health. If no guardian has been appointed in this Commonwealth, the Department is specifically authorized by c. 201, § 6 to file a petition requesting guardianship. After a guardian has been appointed, he may give permission for the ward to undergo whatever surgery he believes will be in the ward's best interest.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The opinion of the Attorney General, dated August 20, 1963, to the Commissioner of Education, applies to like religious practices and activities in the elementary schools within the institutions of the Department of Mental Health.

It would not appear to be appropriate for the Attorney General, in an opinion, to comment upon any extra-legal matters.

No child committed for care and custody to the Department of Mental Health should ever be coerced by the institution into engaging in any religious activities, and provisions for religious activities for persons of differing creeds should be non-discriminatory, as nearly as is possible and practical.

Reasonable requests concerning religious services, etc., should be granted. In general, there are no restrictions which would prevent chaplains from engaging in orderly, scheduled religious activities in which patients participate voluntarily.

FEBRUARY 10, 1966.

HON. HARRY C. SOLOMON, M. D., *Commissioner of Mental Health.*

DEAR SIR:—You have requested my opinion as to the constitutionality of certain religious practices sanctioned by the Department of Mental Health and also as to the scope of an earlier opinion which I gave to the Commissioner of Education. I shall consider the questions in the order presented.

"1. Does your opinion of August 20, 1963 apply to like religious practices and activities in the elementary schools within the institutions of the Department of Mental Health?"

The schools to which you refer are established within certain institutions pursuant to G. L. c. 123, §§ 2, 3 and 45. You state that they are staffed by qualified teachers, principals and other education administrators and exist "for the purpose of giving formal instruction to those children who are educable, and who are patients in residence."

I shall not repeat the contents of my opinion to Commissioner Kiernan, in which I attempted to consider as exhaustively as possible the effect of recent decisions of the United States Supreme Court on religious practices in the public schools of this Commonwealth. You have indicated that you are already familiar with such opinion. In view of the fact that the schools maintained at the institutions of your Department are supported by public funds to provide as much formal education as possible to the residents, my opinion applies to these schools precisely as it would to ordinary public schools. See *Attorney General v. School Committee of North Brookfield*, 347 Mass. 775; *Waite v. School Committee of Newton*, 348 Mass. 767. With the proviso that this answer pertains only to the schools within the institutions, and not necessarily to the institutions in their entireties, I answer your first question "Yes."

"2. Is new legislation necessary to define religious education practices and activities in elementary schools in institutions of the Department of Mental Health?"

New legislation is not necessary in order to apply the principles enunciated by the United State Supreme Court in the *Schempp* and *Murray* decisions of 1963. Whether new legislation might be desirable or necessary for other reasons turns upon considerations of policy within the province of the Legislature rather than upon legal considerations. It would not appear to be appropriate for the Attorney General, in an opinion, to comment upon such extra-legal matters.

"3. Are there any responsibilities or limitations for the religious activities for children while they are not in actual attendance in the elementary schools in the institutions of the Department of Mental Health, but who are committed for care and custody, and remain more or less continuously in the institution?"

The scope of your question makes it impossible to treat this subject matter with anything approaching completeness. The variety of situations which could conceivably arise, and the sensitivity of the issues which may be created, compel me to limit my response to a general approach to the responsibilities imposed upon your Department.

Providing for the religious needs of persons confined to, or voluntarily resident in medical, military, penal and, occasionally, educational institutions supported at government expense may on occasion pose vexatious constitutional problems. The First Amendment to the Constitution of the United States, applied to the states via the Fourteenth Amendment, forbids government from either establishing religion or abridging its free exercise. However, the practical restrictions which institutional life imposes upon the individual may render some abridgment of free exercise unavoidable. Particularly, it is often not feasible for residents of these institutions to attend the religious sanctuaries of their choice either to worship or to receive instruction. Although judicial authority on the subject is scarce, government generally has been permitted to provide the setting and personnel for voluntary religious activities in public institutions. Mr. Justice Brennan's concurring opinion in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 296-299 contains a succinct discussion of the problem and citations of relevant cases and authorities. See also *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 245-248, 254-255 (Mr. Justice Reed dissenting).

While, as I have indicated, it is impossible to discuss all conceivable "responsibilities or limitations for the religious activities of children" committed to the institutions of the Department, the following guidelines may be helpful:

"1. No child should ever be coerced by the institution into engaging in any religious activities. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 631-632. *People ex rel. Ring v. Board of Education*, 248 Ill. 234.

"2. As nearly as is possible and practical, provisions of religious activities for persons of differing creeds should be nondiscriminatory. *Abington School District* case, *supra*, 374 U.S. 203, 215-216 and cases cited.

"3. Reasonable requests for permission to consult a clergyman or lay

leader, to participate in religious services or instruction or to read particular religious literature should be granted, although, of course, in many instances whether a particular request is reasonable will depend on the mental and physical condition, intelligence and adjustment of the person making it. *Brown v. McGinnis*, 10 N.Y.2d 531, 535-536.

You also state in your letter:

"In each of the institutions of the Department of Mental Health there are assigned chaplains of the Catholic, Protestant and Jewish faiths. In addition, there is one chaplain of the Greek-Orthodox faith who visits all of the institutions. These clergymen are defined as non-employees and are compensated from appropriated funds, Subsidiary Account -03. Their role is to provide religious services and care for all other religious needs of patients of their respective faith."

You then ask:

"Are there any restrictions or limitations on these chaplains so far as their religious activities are concerned?"

For the same reasons mentioned with respect to your previous question, I cannot give a complete answer to this inquiry. It is impossible to foresee all conceivable "religious activities" in which individual chaplains may want to engage, and to define any and all possible limitations thereon. If particular activities arise which seem to you to raise a question, I shall be happy to furnish my opinion on the facts of each case. In general, I will say that I see no restrictions which would prevent chaplains from engaging in orderly, scheduled religious activities in which patients participated voluntarily. See *Brown v. McGinnis*, *supra*; *McBride v. McCorkle*, 44 N.J. Super. 468, 480. Cf. *Cox v. New Hampshire*, 312 U.S. 569, 577-578; *In re Ferguson*, 55 Cal. 2d 663, 672; *People ex rel. Ring v. Board of Education*, *supra*. As the Supreme Court of the United States observed in *Zorach v. Clauson*, 343 U.S. 306:

"We are a religious people whose institutions presuppose a Supreme Being . . . We guarantee the freedom to worship as one chooses. . . We sponsor an attitude on the part of government that shows no partiality to any one group . . . Government may not . . . use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

Subject to the limitations outlined above, therefore, my answer to your fourth question is "No."

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

In cooperative ventures between the Department of Mental Health and private charities where the latter collect a fee to defray costs, the Department need not claim any of the amounts collected.

FEBRUARY 14, 1966.

HON. HARRY C. SOLOMON, *Commissioner, Department of Mental Health.*

DEAR DOCTOR SOLOMON:—In your request for an opinion of January 17, 1966, you state that, in accordance with the provisions of G. L. c. 123, § 13A, several non-profit charitable agencies are cooperating with the Division of Mental Hygiene (see G. L. c. 19, § 4A) in the maintenance of out-patient clinics. Section 13A of G. L. c. 123 reads as follows:

“Such of the powers and duties conferred or imposed upon the department, relating to the cause and prevention of mental disease, feeble-mindedness, epilepsy and other conditions of abnormal mentality, as the commissioner may determine may be exercised and performed by the division of mental hygiene. In addition to said powers and duties, said division shall institute inquiries and investigations for the purpose of ascertaining the causes of mental disease, including epilepsy and feeble-mindedness, with a view to its prevention. It may also establish, foster and develop out-patient clinics. Said clinics may be established in collaboration with public schools, private schools or other agencies providing co-operative or complementary facilities to the state clinics. In all instances the site and location of the clinic, number of employees, the hours to be worked, and other regulations, shall be subject to approval by the commissioner and shall be in accordance with all laws and regulations governing state employees of the appropriate classes.”

You further state:

“A review of the program of the Department's Division of Mental Hygiene reveals that these non-profit organizations make a real and lasting contribution to the Commonwealth. It is estimated for example that all thirty-five non-profit organizations contribute approximately \$1,000,000 annually for community services to the area served by clinics of the Division of Mental Hygiene. This is in addition to professional salaries paid by the Commonwealth. . . .

“These non-profit organizations collect a fee from patients seen at the clinic in order to defray the cost of their financial contribution involved in assuming responsibilities . . . as a cooperating incorporated agency (See Acts of 1958, Chapter 124) with the Division of Mental Hygiene. In no instance is any citizen of the Commonwealth deprived of service because of inability to pay such fee. The total of such fees amounts to 17% of the sum total (\$1,000,000) from all sources (*e.g.* United Fund) presently used by the Associations for community services. Professional salaries paid by the Commonwealth are not included in this sum. The Department of Mental Health does not wish to change this fee practice but it is requesting an opinion about the legality of considering this practice as a matter relating solely to the Associations. The Department does not disapprove of the practice unless it is contrary to law. The fee referred to is not necessarily construed as a solicitation.”

Your specific question is whether "this Department [Mental Health] need not claim this fee." I am unaware of any rule of law which holds that in cooperative ventures between government and private charities, the latter are not permitted to charge a fee for their services or that such fees, if charged, must be turned over to the government. The opposite rule has generally been stated, or at least assumed, by the courts. *People ex rel. New York Inst. for the Blind v. Fitch*, 154 N.Y. 14, 25, 35-36. *Craig v. Mercy Hospital-Street Memorial*, 209 Miss. 427, 449, 495. See 14 C.J.S. § 70. Accordingly, I answer that the Department "need not claim" any fees charged by private agencies in the circumstances outlined in your request.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The term "employer" as defined in clause (5) of § 1 of c. 151B, M.G.L., includes "the commonwealth and all political subdivisions, boards, departments, and commissions thereof."

The Legislature has placed the administration and enforcement of the fair practices laws in the hands of the Massachusetts Commission Against Discrimination; this includes the responsibility on its part to make reasonable judgements as to whether the policy and purposes of these laws apply to particular classes of individuals.

FEBRUARY 16, 1966.

MR. WALTER H. NOLAN, *Executive Secretary, Massachusetts Commission Against Discrimination*.

DEAR MR. NOLAN:—You have asked whether certain allegations of Juanita M. Griffin, contained in an affidavit dated January 5, 1966, come within the provisions of G. L. c. 151B, § 4 (1). Mrs. Griffin's affidavit is part of a complaint which she has filed with your Commission against the City of Springfield and the Springfield School Committee.

Mrs. Griffin states in the affidavit that she is a student at American International College in Springfield; that she expected to graduate in June of this year and be certified to teach English on the secondary school level; that just prior to the opening of school last fall, she was advised that the Springfield School Department had denied her the right to practice teach in the Springfield schools; that without such practice teaching, she will be eligible neither for certification nor for sufficient credits to graduate from her college; that the School Department "could find nothing lacking in her qualifications"; and that, because she has not been allowed to accumulate the credits necessary to gain future employment, she feels she has been discriminated against because of her race and color.

I gather that you are concerned primarily with whether the granting of the position in question would create an employment relationship between Mrs. Griffin and the Springfield School Department such as to bring her complaint under G. L. c. 151B, § 4(1).

General Laws c. 151B, § 4 reads, in pertinent part, as follows:

“It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race . . . [or] color . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . .”

The term “employer” is defined in clause (5) of § 1 of G. L. c. 151B to include “the commonwealth and all political subdivisions, boards, departments, and commissions thereof.” Thus the School Committee of Springfield would be an “employer” within the meaning of G. L. c. 151B if it should be established that practice teaching creates an employment relationship.

In remedial and social legislation such as the Massachusetts fair practice laws, the terms “employment,” “hire” and “employ” may be construed broadly. Meaning should be given them that will accomplish the aims of the legislation, having regard to its history, context and purposes. See *Holland v. Celebrezze*, 223 F. Supp. 347, 349, 350 (D. C. Tenn.). *Ringling Bros.—Barnum & Bailey Combined Shows v. Higgins*, 189 F.2d 865, 867 (C.A.N.Y.).

In *N.L.R.B. v. Hearst Publications*, 322 U.S. 111 (1944), the United States Supreme Court discussed a problem somewhat analogous to that posed by your Commission. The N.L.R.B. had ruled that independent news vendors (although not actually hired by the newspapers) were “employees” of the newspapers and hence entitled to coverage under the National Labor Relations Act. The Board’s ruling was reversed by the United States Court of Appeals, but affirmed by the United States Supreme Court. The Supreme Court said:

“Whether, given the intended national uniformity, the term ‘employee’ includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word ‘is not treated by Congress as a word of art having a definite meaning. . . .’ Rather ‘it takes color from its surroundings . . . [in] the statute where it appears’ . . . and derives meaning from the context of that statute, which must be read in the light of the mischief to be corrected and the end to be attained.” (124)

The Court said that Congress “had in mind a wider field than the narrow technical legal relation of ‘master and servant,’ as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others.” (124)

The Court also said that Congress had assigned “primarily to the agency created by Congress to administer the Act” (the N.L.R.B.) the task of determining which groups in society were in such a relationship to require the protection of the Act. (129)

“Like the commissioner’s determination under the Longshoremen’s & Harbor Workers Act, that a man is not a ‘member of a crew’ . . . or that he was injured ‘in the course of employment’ . . . and the Federal

Communications Commission's determination that one company is under control of another . . . , the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has a 'warrant in the record' and a reasonable basis in law."

Turning now to Mrs. Griffin's affidavit, it provides no information about the nature and terms of the practice teaching position denied her. While most school systems in the Commonwealth offer practice teaching programs, the establishment and conduct of these programs are determined by the local school committees and their details vary greatly from community to community. It is impossible to learn all the pertinent characteristics of the program operated in Springfield merely by reference to state law or regulations promulgated by the state Department of Education. The latter merely refers to two semester hours of "supervised student teaching" in listing requirements for certification. I understand that most colleges actually require more than two semester hours of practice teaching for a bachelor's degree in education. Students are usually not paid for practice teaching; they perform duties under the supervision of a regular classroom teacher and their services may confer some benefit upon the school system. In at least some communities the student teacher's college reimburses the regular classroom teacher for providing supervision of the trainee.

To decide whether the granting of the position denied Mrs. Griffin would create an employer-employee relationship between her and the Springfield School Department requires more factual information. The duties that someone in her category would perform in the Springfield system; the time to be devoted to them; the benefits to the school system; her likely responsibilities; the formalities of her appointment; whether being turned down by the Springfield system makes it impossible, from a practical point of view, for her ever to gain the practice teaching experience needed for certification—all of these facts, and perhaps others, could be relevant to the question you ask.

It would not, however, be proper for me, as Attorney General, to conduct an investigation into these facts and then decide whether Mrs. Griffin's complaint comes within the statute. The Legislature has placed administration and enforcement of the fair practice laws in the hands of your Commission. This includes the responsibility on your part to make reasonable judgments as to whether the policy and purposes of these laws apply to particular classes of individuals. See *N.L.R.B. v. Hearst Publications, supra*, 130-12. Your position is analogous to the National Labor Relations Board in that case. You have statutory powers and procedures under which you may hold hearings and receive evidence. In the present case, it is my considered opinion that the question you ask should be answered by the Commission itself after a full agency hearing at which all interested parties may appear and present evidence. Only after a hearing, can you determine, on the basis of an adequate record interpreted in the light of your own experience and policy (and with such further legal advice as you may request from this office), whether "the mischief to be corrected" and "the end to be attained" by the cited statute, and related statutes, bring Mrs. Griffin under the jurisdiction and protection of your Commission.

In deciding this question, you should not view paragraph (1) of § 4 in isolation. It is to be read as part of a comprehensive statutory scheme to combat discrimination. General Laws c. 151B, forbids discrimination in private and public employment, in membership in a labor organization, in the insurance or bonding business, in the granting of mortgage loans, and in the sale and rental of housing. General Laws c. 151C, § 2 forbids an "educational institution":

"(a) To exclude or limit or otherwise discriminate against any United States citizen or citizens seeking admission as students to such institutions because of race, religion, creed, color or national origin."

Section 1 of the Act inserting G. L. c. 151B, provides:

"The right to work without discrimination because of race [or] color . . . is hereby declared to be a right and privilege of the inhabitants of the commonwealth."

Section 1 of the Act inserting G. L. c. 151C, provides:

"It is hereby declared to be the policy of the commonwealth that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race [or] color. . . ."

In the light of such sweeping enactments and policy statements against discrimination both in employment and education, the Commission may well decide that a complaint such as that filed by Mrs. Griffin (if—and, of course, only if—it can be factually supported) deals with "mischief" which the Legislature intended to correct.

In this regard, I would call to your attention the very real possibility that a practice teaching position falls within G. L. c. 151C, relating to fair educational practices, rather than G. L. c. 151B, § 4 (1), relating to employment. It may be that the teacher training afforded by the Springfield school system is an educational program to which Mrs. Griffin was seeking admission. Refusal, on grounds of color or race, to admit a qualified student to such program might well be a violation of the Fair Educational Practices Act.

Nevertheless, only after hearing the full range of pertinent evidence, will you be able to make a final determination. Without such evidence, neither you, nor a reviewing court, can satisfactorily answer the question. Moreover, it would not be fair either to Mrs. Griffin or to the School Committee of the City of Springfield to rule finally on this question without affording them the opportunity to be heard and to present evidence.

Accordingly, while respectfully declining to answer your question in the form submitted, I would express the opinion that you have reasonable grounds at this preliminary stage of the proceeding to believe that the Commission may have jurisdiction, although perhaps more likely under G. L. c. 151C than G. L. c. 151B. Under such circumstances, I would advise you to process the complaint in your usual fashion and to assert jurisdiction until such time as the Commission is able to make a

definitive jurisdictional ruling after public hearing (should the case be carried that far).

For your guidance, I make the following specific suggestions as to future procedure:

(1) Mrs. Griffin should be advised of the possibility of amending the legal basis of her complaint to include G. L. c. 151C, § 2(a).

(2) Her complaint should be processed in accordance with your regular procedures, including investigation and consideration of whether there is probable cause for crediting its allegations. If a determination of no probable cause is made, the complaint should be dismissed. If probable cause is found, conciliation should be attempted. If conciliation succeeds, the matter will, of course, be ended, and there will be no further proceedings. If conciliation fails, the investigating commissioner must determine whether to submit the case for a public hearing.

(3) If the case is sent to public hearing, the respondents may, if they choose, raise the issue of the Commission's jurisdiction. All parties, including the Commission, may then put into the record evidence material to the nature of the practice teaching position sought by Mrs. Griffin, and the Commission's jurisdiction over her complaint. Thereafter, in the light of this evidence, the Commission can rule on the issue of jurisdiction, subject to judicial review as provided by law.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

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Any grievance of employees, whether based on "Employment Procedures" or not, is not a proper subject for the procedures set up by G. L. c. 30, § 53 et seq. when it relates to a matter excluded from those procedures by the explicit language of the statute. An administrative body cannot assume jurisdiction not granted to it by the General Court. Any portion of the agreement on "Employment Procedures" which involves "assignments of tours of duty" is plainly not within the jurisdiction of the Personnel Appeals Board, and any alleged violation thereof cannot be considered by that agency.

FEBRUARY 16, 1966.

HON. JOHN J. MCCARTHY, *Commissioner of Administration, Executive Office for Administration and Finance.*

DEAR COMMISSIONER MCCARTHY:—You have requested my opinion as to the scope of authority of the Personnel Appeals Board (G. L. c. 30, § 54) with respect to certain grievances of employees in the Department of Mental Health. You state in your request: "The Commissioner of the Department of Mental Health and employee representatives voluntarily entered into an agreement called 'Employment Procedures' on August 14, 1962." You further state that certain employees have subsequently presented grievance petitions in which they allege that "the appointing authority had abused his discretion in the assignment of tours of duty in violation of the terms of said 'Employment Procedures,'" and that the

Commissioner of Mental Health has questioned the jurisdiction of the Personnel Appeals Board to hear or decide such petitions.

You ask whether an alleged violation of the "Employment Procedures" may properly qualify as a grievance under the provisions of G. L. c. 30, §§ 53 to 57 inclusive, and under the rules promulgated by the Director of Personnel and Standardization as required by § 53.

Chapter 30, § 53 states in part:

"The director of personnel and standardization shall make . . . rules and regulations providing informal procedure for the prompt disposition of any grievance of any employee of the commonwealth, or of any group of such employees employed by the same appointing authority, relating to classification, hours of employment, vacations, sick leave or other forms of leaves of absence, overtime, and other matters relating to conditions of employment, *except assignments of tours of duty*. No such grievance shall be so disposed of if the disposition thereof is within the jurisdiction of the civil service commission or the contributory retirement appeal board. . . ." [Emphasis supplied.]

Although the above statute makes no mention of agreements entered into between department heads and representatives of employees within their respective departments, it is my opinion that certain grievances which might arise under such agreements may properly fall within the jurisdiction of the grievance procedure established by § 53, *supra*. The existence of an agreement governing selected aspects of the employer-employee relationship cannot operate to exclude from the grievance procedure any matter which would otherwise be clearly cognizable. In short, if jurisdiction exists over a particular class of grievances in the absence of any agreement, jurisdiction over that class will not be defeated or otherwise affected by the fact that a department head and his employees have entered into an agreement which happens to include provisions which relate to such grievances. The terms of an agreement may affect the eventual disposition of a grievance, but they may not expand or contract the administrative jurisdiction set out in c. 30, § 53.

However, it is clear that any grievance of employees, whether based on the "Employment Procedures" or not, is not a proper subject for the procedures set up by G. L. c. 30, § 53, *et seq.*, when it relates to a matter excluded from those procedures by the explicit language of the statute. An administrative body cannot assume jurisdiction not granted to it by the General Court. *Hathaway Bakeries v. Labor Relations Commission*, 316 Mass. 136, 141; *Scannell v. State Ballot Law Commission*, 324 Mass. 494, 501; *Chamberland v. Selectmen of Middleborough*, 328 Mass. 628, 631. Any portion of the agreement on "Employment Procedures" which involves "assignments of tours of duty" is plainly not within the Board's jurisdiction, and any alleged violation thereof may not be considered by that agency.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Upon enactment of the provisions of c. 7, § 30K, M.G.L., it was expected that the costs and charges certified by the Director of Hospital Costs to the Commissioner of Administration would be based upon investigation and examination of presently available facts and figures, and not upon speculation as to future developments in hospital economics. The statute requires of the Director certification of concrete and reliable figures, and provides him with the necessary authority to acquire whatever data may be relevant to his determination.

The proper certification by the Director of present costs and charges is a condition precedent to lawful establishment of rates by the Commissioner of Administration under c. 7, § 30K, and the rates certified by the Commissioner on the basis of projected or estimated ward costs and charges have not been legally established in accordance with statute.

Chapter 7, § 30K does not authorize the Commissioner to establish different rates for well new-born infants or for any other specialized group of welfare patients.

FEBRUARY 16, 1966.

HON. THOMAS A. CHADWICK, *Clerk of the Senate.*

DEAR MR. CHADWICK:—You have transmitted to me a copy of an order adopted by the Senate on February 10, 1966, which relates to the setting and promulgation of certain rates for the hospital care of welfare patients pursuant to the provisions of § 30K of c. 7 of the General Laws. This order contains a request for the opinion of the Attorney General on certain matters, and relates the following factual information:

The Commissioner of Administration conducted a hearing on January 26, 1966, in conformity with G. L. c. 30A, § 3, in order to determine hospital rates to be certified by him in accordance with G. L. c. 7, § 30K for the calendar year 1966. The order states that "it also appears that the Director of Hospital Costs and Finances has not certified to said Commissioner the costs and charges which in accordance with said section 30K it is provided should be so certified but in lieu thereof, and by order of said Commissioner, by letter to said Director dated January 7, 1966, filed with the Commissioner projected or estimated ward costs and charges for the year commencing January 1, 1966." [Emphasis supplied.] After such filing by the Director of Hospital Costs and Finances, and subsequent to the hearing referred to above, the Commissioner of Administration certified a set of rates for the hospital care of welfare patients.

In light of the facts contained in the order, the Senate has posed the following questions of law:

"1. In view of the foregoing, are the rates so certified by said Commissioner legally and properly established in accordance with statute?

"2. Does said section 30K of said chapter 7 authorize the Commissioner of Administration to establish special rates of payment for well new-born infants?

"3. Since the establishment of rates under said section 30K of said chapter 7 constitute 'regulations' as defined in section 1 of chapter 30A of the General Laws, and require that the procedures set forth in said chapter 30A (State Administrative Procedure Law) be followed (*Mass. Gen. Hospital v. City of Cambridge*, 347 Mass. 519), and since the Commissioner of Administration called a hearing on such rates in the year 1965 in conformity with the provisions of section 2 of said chapter 30A, and called a hearing on such rates in the year 1966 in conformity with the provisions of section 3 of said chapter 30A, which of said sections is the proper section under which to call a hearing prior to determining any such hospital rates?"

I will consider these inquiries in the order in which they appear.

The procedures developed by the Legislature in § 30K of c. 7 appear to contemplate a cooperative effort in the setting of the rates in question between the Commissioner of Administration and the Director of Hospital Costs and Finances. The statute provides in relevant part as follows:

"The director of hospital costs and finances shall determine from time to time and certify to the commissioner of administration, at least as often as annually, *the average all-inclusive per diem charge to the general public for public ward accommodations or their equivalent, the all-inclusive per diem cost of care in such accommodations and the all-inclusive per diem cost of care for all patients of each hospital, sanatorium and infirmary* licensed by the department of public health under section seventy-one of chapter one hundred and eleven. In determining such all-inclusive charges and costs, charges for and costs of ancillary services shall be included. If he is unable to determine the all-inclusive per diem cost of care in public ward accommodations or their equivalent of any hospital, sanatorium or infirmary, he shall certify as aforesaid in lieu thereof an amount equal to seventy-five per cent of the all-inclusive per diem cost of care for all patients of such hospital, sanatorium or infirmary, said cost, however, shall not exceed the sum of fifteen dollars per diem.

"Each such hospital, sanatorium or infirmary shall file with the director from time to time on request such data, statistics, schedules or information as he may reasonably require to enable him to determine such charges and costs. . . . The director shall have the power to examine the books and accounts of any such hospital, sanatorium or infirmary if in his opinion, such examination is necessary to determine such charges and costs. The director shall make his determination as aforesaid in accordance with a uniform system of hospital accounting and cost analysis and shall take into account the value of services by members of religious orders regularly working in a hospital which are rendered for partial or no payment, depreciation and a fair return on invested capital for proprietary hospitals, but shall not include grants-in-aid for which no services are rendered. . . ." [Emphasis supplied.]

It is clear that the complex task of accumulating data relative to hospital costs and charges has been assigned to the Director of Hospital

Costs and Finances; this relieves the Commissioner of Administration from the responsibility of investigating and compiling a large amount of statistics and other materials which must be identified and examined before accurate hospital rates may be established. Responsibility for such investigation would impose a real burden upon the Commissioner, considering the many other duties vested in his office by the General Court.

As an alternative, the Legislature has created within the so-called Fiscal Affairs Division of the Executive Office for Administration and Finance a Bureau of Hospital Costs and Finances headed by a Director [G. L. c. 7, § 4B]. Under c. 7, § 30K, the Director must fulfill certain responsibilities with respect to the identification of current hospital costs and charges in order to provide the Commissioner of Administration with information essential to accurate setting of the particular rates. Once he has received the necessary information from the Director of Hospital Costs and Finances, the Commissioner of Administration must then proceed to establish appropriate rates and to certify them to the departments, boards and commissions concerned.

"The commissioner shall certify annually to each of the various departments, boards or commissions of the commonwealth purchasing care in such hospitals, sanatoria and infirmaries, or reimbursing cities or towns for such care purchased by them, such rates with respect to each such hospital, sanatorium and infirmary as will reflect reasonable hospital costs or charges made to the general public, whichever is the lower. All departments, boards or commissions of the commonwealth purchasing such service shall pay the rates so certified. The various subdivisions of the commonwealth purchasing hospital care and receiving reimbursement therefor, in whole or in part from the commonwealth, shall pay the hospitals, sanatoria and infirmaries for such care at the rates so certified. The commissioner shall also certify at least annually to the department of industrial accidents the all-inclusive per diem cost of care for all patients for each such hospital, sanatorium and infirmary."

These rates are presumably based upon reliable information as to current hospital costs and charges furnished by the Director in accordance with the first two paragraphs of c. 7, § 30K.

It is my opinion that when the General Court enacted the provisions of c. 7, § 30K it expected that the costs and charges certified by the Director to the Commissioner of Administration would be based upon investigation and examination of presently available facts and figures, and not upon speculation as to future developments in hospital economics. The statute requires of the Director certification of concrete and reliable figures, and provides him with the necessary authority to acquire whatever data may be relevant to his determinations. The first sentence of § 30K calls for certification of an "average all-inclusive per diem charge"; determination of an average connotes the availability of varying figures, from which one "average" figure may be derived. It does not suggest prediction of a figure which the Director believes may be accurate for the coming year.

The statute contains specific directions with respect to the procedures

of the Director. In his determination, "charges for and costs of ancillary services shall be included." The Director must employ "a uniform system of hospital accounting and cost analysis and must take into consideration the value of services rendered by members of religious orders for partial or no payment, depreciation factors and the desirability of a fair return on capital invested by proprietary hospitals. He shall not consider "grants-in-aid for which no services are rendered." Should he conclude that the per diem cost of care in a given institution is excessive compared to that of hospitals of equivalent size and character, he is authorized to determine "a weighted average all-inclusive per diem cost of care" for the particular institution and certify the same to the Commissioner of Administration.

Each institution must cooperate by providing the Director with data necessary to his investigation.

"Each such hospital, sanatorium or infirmary shall file with the director from time to time on request such data, statistics, schedules or information as he may reasonably require to enable him to determine such charges and costs. . . ."

Persons failing to furnish information as reasonably requested, or filing false returns, may be subjected to criminal penalties. And the Director may himself examine the books and accounts of a given institution if he believes that such an audit is necessary to accomplish his objective.

The specific nature of the statutory instructions applicable to the work of the Director, and the extensive authority given him to compel production of data relevant to present costs and charges, clearly indicate that the General Court intended the Director to certify current rather than future figures. There is available to the Director all of the material which he would ordinarily need to determine present costs and charges, and the Legislature has included in the statute several concrete directions as to how such material is to be treated. Such a precise approach is totally inconsistent with certification based upon prediction and projection.

Nor do I believe that the authority to predict costs and charges may be implied as an acceptable alternative should the Director be unable to reach a conclusion on the basis of data which is available to him. The General Court has itself provided an alternative in the case of the per diem cost of care for public ward accommodations:

"If he [the Director] is unable to determine the all-inclusive per diem cost of care in public ward accommodations or their equivalent of any hospital, sanatorium or infirmary, he shall certify as aforesaid in lieu thereof an amount equal to seventy-five per cent of the all-inclusive per diem cost of care for all patients of such hospital, sanatorium or infirmary; said cost, however, shall not exceed the sum of fifteen dollars per diem."

G. L. c. 7, § 30K.

No alternatives having been provided in the statute for the making of the other determinations assigned to the Director, I can only conclude that the Legislature assumed that the Director would in those instances

be able to make a reasonable certification, and that no substitute method was necessary.

The statute clearly does not authorize the type of projection of figures to which the Senate has referred in its order of February 10, 1966. Certification based upon prediction is, as I have indicated above, inconsistent with the precision apparently called for by c. 7, § 30K, and unnecessary in light of the obvious availability to the Director of all data which might reasonably be required to reach a conclusion. Prediction cannot provide the type of reliable figures which the Commissioner of Administration must have in order properly to set the rates in question. Accordingly, in response to the Senate's first question, it is my opinion that proper certification by the Director of present costs and charges is a condition precedent to lawful establishment of rates by the Commissioner of Administration under c. 7, § 30K, and that rates certified by the Commissioner on the basis of projected or estimated ward costs and charges have not been legally established in accordance with statute.

The Senate has in addition asked whether § 30K of c. 7 of the General Laws authorizes the Commissioner of Administration to establish special rates of payment for well new-born infants. The rates recently established by the Commissioner do not contain special figures applicable to new-born infants, and it has not been the practice to have special rates for particular categories of patients. Rather, the Commissioner has in the past set a single figure for each hospital or other institution for which rates must be established, with such single figure intended to be applicable to each welfare patient irrespective of the type of treatment given. I gather that—in question No. 2 of its order—the Senate is concerned with (1) whether the Commissioner must by law establish special rates for special categories of welfare patients; and (2) whether the Commissioner may in his discretion establish such special rates if he desires.

It is my opinion that c. 7, § 30K does not authorize the Commissioner of Administration to establish different rates for well new-born infants or for any other specialized group of welfare patients. It is plain that the statute simply does not provide the tools with which the Commissioner could effectively set rates for varying categories of patients. It is the responsibility of the Director of Hospital Costs and Finances to certify to the Commissioner cost and charge figures for patients in general and for welfare patients in particular. The Director is not required to provide separate figures for different types of patients, and the Commissioner therefore does not have the material upon which varying hospital rates applicable to different welfare patient groups could be based.

Rather, it appears to have been the intention of the General Court that a single rate for each hospital or other institution be established. Section 30K of c. 7 does not, in my opinion, contemplate attempts by the Commissioner to establish rates which vary with the particular services provided. Such an approach would require not only the setting of rates applicable to specialized groups such as well new-born infants, but also the calculation of reimbursement figures dependent upon the services provided by the given hospital—surgical services, rehabilitation, etc.

Establishment of rates in this manner is virtually impossible under c. 7, § 30K as that statute is presently drafted.

Since the Legislature has not provided statutory procedures under which such individualized rates may be calculated, I can only conclude that the Legislature intended that a flat rate be set for each institution, such rate to be applicable irrespective of the nature of the services given the patient. It may well be that the General Court has proceeded upon the theory that the rates—applied in this fashion—will approximately reflect the total services provided by a given institution. Be that as it may, it is my opinion that the Commissioner of Administration may not—under the present statutory framework—lawfully establish special rates for particular groups of welfare patients, and I accordingly answer the second question in the negative.

The final question posed by the Senate in its order relates to the section of G. L. c. 30A [the State Administrative Procedure Act] under which the rates discussed above should be established. The order indicates that the Commissioner of Administration followed the provisions of § 2 of the Act when setting rates for the year 1965, but that he has operated pursuant to § 3 with respect to the 1966 rates. Accordingly, the Senate has inquired “which of said sections is the proper section under which to call a hearing prior to determining any such hospital rates.”

Section 2 of c. 30A relates to the adoption or amendment of regulations “as to which a hearing is required by law” [see *Massachusetts General Hospital v. Commissioner of Public Welfare*, 346 Mass. 739, 740], and regulations under which criminal penalties may be imposed for violations. This section requires the holding of a public hearing with respect to the proposed regulation. Section 3 of the Administrative Procedure Act is applicable to all other regulations; under § 3, the agency which seeks to promulgate regulations may dispense with a public hearing, although it must ordinarily at least provide an opportunity for the expression of views in writing.

The rates established by the Commissioner of Administration under c. 7, § 30K are “regulations” as that term is defined in c. 30A, § 1(5).

Massachusetts General Hospital v. City of Cambridge, 347 Mass. 519, 522

It is clear that they are regulations which may be enacted pursuant to the provisions of § 3 of c. 30A. These regulations are not criminal in any sense. Nor does there appear any statutory provision which expressly requires the holding of a public hearing with respect to them; certainly c. 7, § 30K does not contain such a provision. [Cf. c. 7, § 30L relating to the setting of nursing home rates in which a hearing is specifically required. See also *Massachusetts General Hospital v. Commissioner of Public Welfare*, *supra*, which involved the requirement of a hearing under c. 121, § 3.] The Supreme Judicial Court has indicated that the rates in question may appropriately be enacted pursuant to § 3.

Massachusetts General Hospital v. City of Cambridge, *supra*, at page 523

The fact that the Commissioner may have chosen to hold a public

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hearing in the past does not bind him to do so in the future. Neither does it operate to invalidate past rates; § 3 of c. 30A establishes minimum procedures which must be observed, and does not prohibit an agency from electing to comply with stricter standards. Accordingly, in response to the Senate's third question, it is my opinion that, while § 3 of c. 30A is the more appropriate, the Commissioner may proceed under either § 2 or § 3 of that chapter.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Board of State Examiners of Plumbers does not have the authority to promulgate a rule or regulation which would conflict with any of the provisions of c. 142 of the General Laws. Should the Board restrict the issuance of plumbing permits to master plumbers only, the Board would in effect be attempting to amend provisions of the statute which governs its operations. Such a regulation would conflict with provisions of G. L. c. 142, and accordingly may not lawfully be promulgated by the agency.

FEBRUARY 23, 1966.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration*.

DEAR MRS. SULLIVAN:—On February 4, 1966, you requested an opinion on behalf of the Board of State Examiners of Plumbers relative to the following question:

"Under Chapter 358, Acts of 1965, would it be constitutional for this Board to make a ruling that . . . Permits to perform plumbing shall be issued to master plumbers only."

Section 1 of c. 358 of the Acts of 1965 repealed G. L. c. 142, § 8. Section 8 had provided for the formulation by the Board of State Examiners of Plumbers of rules relative to the construction, alteration, repair and inspection of plumbing within towns which had not prescribed such regulations pursuant to c. 142, § 13 or corresponding provisions of earlier laws.

Section 2 of c. 358 of the Acts of 1965 repealed c. 142, § 13 (as most recently amended by St. 1963, c. 228, § 2). Section 13 had required that each city, except Boston, and each town with 2,000 or more inhabitants or with a system of water supply or sewerage must by ordinance or by-law promulgate plumbing regulations. St. 1965, c. 358, § 2 substituted the following:

"In all cities, except Boston, and in each town which has two thousand inhabitants or more, the examiners [the Board of State Examiners of Plumbers], subject to the approval of the department of public health, shall make and from time to time in like manner alter, amend and repeal rules and regulations relative to the construction, alteration, repair and inspection of plumbing in such cities and towns, which rules and regulations shall be reasonable, uniform, and based on generally accepted standards of plumbing practice; provided, however, that the application

of such rules and regulations may be varied by the examiners in a particular city or town upon petition of the board of health or health department thereof."

By § 3 of c. 358 of the Acts of 1965, the General Court provided that any ordinance, by-law or regulation adopted prior to the effective date of this chapter, and in effect on that date, would continue in effect until superseded by the rules and regulations to be promulgated by the Board of State Examiners of Plumbers.

The purpose of St. 1965, c. 358 is to remove from the cities and towns of the Commonwealth primary responsibility for the promulgation of plumbing regulations and to vest such responsibility in the Board of State Examiners of Plumbers. Formerly, the Board had been called upon to formulate regulations only when petitioned to do so by a local board of health under the provisions of c. 142, § 8. Now the Board has been given the responsibility of promulgating rules and regulations which will govern plumbing in most of the communities of Massachusetts. You have asked whether—given this new authority—the Board may lawfully promulgate a regulation which would authorize the issuance of plumbing permits to master plumbers only.

It is an axiom of administrative law that an agency authorized to promulgate rules and regulations may not enact a regulation which is inconsistent in any way with its governing statute. The fact that the Legislature has chosen to vest rule-making responsibility in a state agency rather than in agencies of municipal governments does not affect the application of this principle. It is clear that the Board of State Examiners of Plumbers does not have the authority to promulgate a rule or regulation which would conflict with any of the provisions of c. 142 of the General Laws.

Chapter 142 refers to both master plumbers and journeymen. "Journeyman" is defined in § 1 of the chapter as "a person who himself does any work in plumbing subject to inspection under any law, ordinance, by-law, rule or regulation." A "master plumber" is "a plumber having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work." Journeymen are referred to in § 3 relative to the necessity, exhibition and display of a license. Section 4 provides for the examination of journeymen, and § 5 relates to fees for such examinations. Section 16 provides for journeymen who are not lawfully registered or licensed.

It is clear that the General Court contemplated the existence of two classes of plumbers—master plumbers and journeymen—and authorized the performing of plumbing operations by each. This legislative treatment cannot lawfully be altered by administrative action. Should the Board of State Examiners of Plumbers restrict the issuance of plumbing permits to master plumbers only, the Board would in effect be attempting to amend provisions of the statute which governs its operations. It is my opinion that such a regulation would conflict with provisions of G. L. c. 142, and accordingly may not lawfully be promulgated by the agency.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

An armorer, not subject to the forty-hour week, working in excess of his usual work may be compensated for such extra hours at a fixed hourly rate for services, assuming that an appropriation were provided for that purpose.

Employees of the Commonwealth not specifically exempted from the operations of G. L. c. 149, § 30B, entitled to its benefits.

The Legislature may not provide for the "rental", in the contractual sense of the word, of any facility owned by the Commonwealth to one of its own agencies, unless that agency is a body politic and corporate. The General Court may, of course, direct particular transfers of funds from one governmental agency to another, without imposing contractual rights and liabilities as such.

FEBRUARY 23, 1966.

MAJOR GENERAL JOSEPH M. AMBROSE, *The Adjutant General*.

DEAR GENERAL AMBROSE:—In a recent request for an opinion, you point out that there are seventy-four armories and air installations owned by the Military Division of the Commonwealth and state:

"Section 122 of Chapter 33 provides that armories, when not required for military purposes, may be rented for certain public and private purposes; and each armory and air installation receives a great deal of such non-military use throughout the year, producing an annual return to the State Treasury in Fiscal Year 1965 of \$65,452.43. . . ."

In connection with the rental of armories and air installations for certain non-military purposes [see G. L. c. 33, § 122(c) and (e)], according to your letter, "the Military Division requires the renting organization to . . . compensate personnel designated by the . . . Division who are on duty [while the facility is rented] for the purpose of protecting the building and military equipment, supervising utilities, opening and closing the building prior and after its use, removing and replacing military equipment, and cleaning the building after use. Normally, because of their familiarity with the buildings, utilities and security requirements, armorers and laborers who are regularly employed by the Commonwealth are designated by the Military Division for this purpose, occasionally assisted by members of the active National Guard who are not otherwise employed by the Commonwealth."

You add:

"Notwithstanding the provisions of paragraph (d) of Section 122 of Chapter 33, it appears that from time immemorial, the personnel employed for the above purposes, have been paid directly by the renting organization, with the balance of the rental costs paid to the State Treasury."

You assume that direct payment to armorers and others by persons renting an armory or air installation is "illegal" and do not request my opinion as to the correctness of this assumption. Since, in any event, you seem to be opposed to such direct payment, whether such direct payment is legal or otherwise, I shall not express an opinion on the subject.

In light of these facts, you ask the following questions:

"1. May an armorer, not subject to the forty-hour week, be paid in addition to his regular pay, by the Military Division, assuming that an appropriation were provided for the purpose, at a fixed hourly rate for services performed in guarding an armory or air installation, in moving military equipment, and in cleaning the facility, in connection with the rental of the installation for non-military purposes, for which services the Commonwealth is reimbursed as part of the rental?

"2. May a laborer, second-class power-plant engineer or carpenter likewise receive additional pay at the same fixed hourly rate for such services, notwithstanding the fact that he is subject to the forty-hour week and would be entitled to overtime compensation under Section 30B of Chapter 149 of the General Laws for extra work required by the Military Division in his usual capacity, as distinguished from non-military-use employment?

"3. Are the personnel referred to in questions 1 and 2 considered to be in the scope of their employment as employees of the Commonwealth while performing the services described in question 1 in connection with non-military use of military installations?

"4. Are other personnel, military or civilian, who are not regular employees of the Commonwealth, deemed to be employees of the Commonwealth while employed at a fixed hourly rate to perform services described in question 1?

"5. In the rental of a military installation to another department or agency of the Commonwealth, may that department or agency be charged a rental which includes the cost of personnel services described in question 1?"

I shall consider these questions in the order in which they have been posed.

1. I assume that the first question applies to services by armorers in excess of their usual work week and should be read as if the words "by the Legislature" appeared after the word "purpose." Although G. L. c. 149, § 30A, establishing a maximum forty-hour work week for certain employees of the Commonwealth, explicitly excludes "armorers" (*inter alia*) from its scope, I see no reason why the Legislature may not provide that armorers working in excess of their usual work week to guard (or perform other duties at) armories and air installations during the rental thereof shall be compensated for such extra hours "at a fixed hourly rate for services." See *Woods v. Woburn*, 220 Mass. 416, 418. It follows that the Legislature may appropriate the money for such compensation. *Opinion of the Justices*, 323 Mass. 764, 767-768. The first question should be answered "Yes."

I treat questions 2 and 3 as one question. I assume that you are in effect asking whether armorers and laborers, second-class power-plant engineers and carpenters, while engaging in "non-military use employment" at armories and air installations under rental, are "employees of

the Commonwealth" and thus entitled to the benefits of G. L. c. 149, § 30B.

Section 30B of G. L. c. 149 states in part:

"All service in excess of . . . forty hours in any one work week rendered by any employee of the commonwealth . . . shall be compensated for at the rate of one and one half times the regular hourly rate of said employee for every hour or fraction thereof of such services rendered. . . ."

While several categories of employees, including armorers, are explicitly excluded from the benefits of this section, laborers, second-class power-plant engineers and carpenters are, as you concede, covered thereby. I see no basis in this statute for distinguishing between an employee's "usual capacity" and his "non-military use employment" to determine whether he is entitled to time-and-a-half pay for work in excess of forty hours per week. An employee is entitled to statutory overtime benefits when he engages, beyond his regular hours in "physical or mental exertion [whether burdensome or not] controlled or required by the employer and primarily for the benefit of the employer and his business." *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 598; *Jewel Ridge Coal Co. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 164-165; *Republican Publishing Co. v. American Newspaper Guild*, 172 F.2d 943, 945 (C.A. 1); *Martin v. Graham Ship-by-Truck Co.*, 176 S.W. 2d 842, 847 (Kan. City, Mo. Ct. of App.). See also Restatement of the Law of Agency 2d, § 228, § 233 [comment (a)]; *Driscoll v. Towle*, 181 Mass. 416, 419. It makes no difference in the case that you present that the employer happens to be the Commonwealth.

The Legislature seemed to contemplate that the regular employers would guard and maintain armories and air installations rented pursuant to statute, for G. L. c. 33, § 122 states:

"(d) Compensation for the use of any armory or air installation under subsection (c) shall be fixed by the adjutant general with the approval of the commander-in-chief, and shall be at least sufficient to cover all expenses of lighting, heating, and guarding the armory or air installation, and similar expenses. Such compensation shall be paid to the adjutant general, who shall pay the same to the commonwealth.

"(e) Subject to subsection (b) an armory or air installation may be used for:

(2) For a period not exceeding three days for any exhibition of the products of labor, agriculture or industry, including any automobile exhibition conducted by a responsible organization, and, for the purpose of decorating the premises, for such additional time immediately preceding said period, not exceeding eighteen hours, as may be approved by the military custodian and the adjutant general, and for the purpose of removing decorations, exhibits or equipment, for such additional time immediately following said period, not exceeding eighteen hours, as may so be approved; provided, that the compensation for such uses shall

in no case be less than the fair rental value, for the entire period during which the armory or air installation is occupied by any such exhibit or equipment, of halls of a similar nature in the same or a similar city or town, together with a sum sufficient to cover the expenses of providing such guards and labor as may be necessary to protect the armory or air installation while so used and to remove and replace items of military equipment while so used. . . ."

In view of this statute and the information contained in your letter, I assume that the personnel kept on duty while armories and air installations are under rental perform the kind of work they usually perform, that such work occurs within the time contemplated by G. L. c. 33, § 122 (d) and (e) (2), that such personnel remain subject to the control of their superiors, and, most important, that they are primarily serving the interests of the Commonwealth in guarding and maintaining its property.

Armoreders, as you state in your letter, are explicitly excepted from the coverage of G. L. c. 149, § 30B. The employees to whom you refer in question 2 are, as already pointed out, not excepted. Employees of the Commonwealth not specifically exempted from the operation of G. L. c. 149, § 30B are entitled to its benefits. See 1956 Report of the Attorney General, pp. 52-53. I conclude that the second question should be answered "No" and the third question, except in so far as it relates to whether armorers are entitled to time-and-a-half pay under G. L. c. 149, § 30B, should be answered "Yes."

4. To determine whether particular temporary personnel are employees of the Commonwealth, I would have to know who hires these persons and exercises control over their activities, the terms on which they are employed, and the purpose for which they are hired. None of this information with regard to the employees referred to in the fourth question is contained in your request. Moreover, a person may be an employee of the Commonwealth for some purposes but not for others. In view of the general nature of your fourth question, and the absence of necessary information, I am unable to respond to it.

5. The Legislature specifically considered the possibility that certain non-military agencies of the Commonwealth would find occasion to use armories and air installations, and in G. L. c. 33, § 122 (c) provided:

"Subject to subsection (b), armories or air installations may be used temporarily for the following purposes:

"(1) A public meeting or hearing held by a state department, board or commission.

"(2) An examination conducted by a state department, board or commission. . . ."

Without making any exception for uses of the armories by a "state department, board or commission," the Legislature provided in part (d) of this section (already quoted) that compensation for the use of any armory or installation under § 122(c) "shall be paid to the adjutant general, who shall pay the same to the commonwealth." Since, like the Military Division, state boards, departments and commissions are gener-

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ally not bodies politic and corporate, which may exist as financial entities separate from the Commonwealth (see *Opinion of the Justices*, 334 Mass. 721, 733-734) the Legislature seemingly has created a condition in which one agency of the Commonwealth may incur an obligation to another such agency, or, to dramatize the paradox, the Commonwealth incurs an obligation to itself.

It has been held in numerous jurisdictions that a state is "as capable of making a contract as an individual is." [Emphasis supplied.] *Trustees of the Internal Imp. Fund v. Bailey*, 10 Fla. 112, 130. *State ex rel. Plock & Co. v. Cobb*, 64 Ala. 127, 156. *Carr v. State*, 127 Ind. 204, 207. *Saratoga State Waters Corp. v. Pratt*, 227 N.Y. 429, 440. *Murray v. Charleston*, 96 U.S. 432, 445. See cases collected at 49 Am. Jr. 274, nn 14, 18. "But it is a first principle, that in whatever capacities a person may act, he never can contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee." *Eastman v. Wright*, 6 Pick. 316, 320. See Corbin on Contracts § 55; Williston on Contracts (3rd Ed.), §§ 18, 308. I conclude that the Legislature may not provide for the "rental," in the contractual sense of the word (see *Rice v. Loomis*, 139 Mass. 302, 303), of any facility owned by the Commonwealth to one of its own agencies, unless that agency is a body politic and corporate. The General Court may of course direct particular transfers of funds from one governmental agency to another, without imposing contractual rights and liabilities as such. I express no opinion as to what informal arrangements may be made between departments, boards or commissions and the Military Division for transfers of funds from one control to another for the use of armories. In the sense that no such departments, boards or commissions may become liable to the Military Division for the use of its facilities or for the services of its personnel, I answer the fifth question "No."

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Department of Mental Health may determine as to voluntary admittance or involuntary commitments to medical center at Lowell.

MARCH 1, 1966.

HON. HARRY C. SOLOMON, *Commissioner of Mental Health*.

DEAR DOCTOR SOLOMON:—You request an opinion as to the status of a mental health center now under construction in Lowell (see St. 1962, c. 477). By way of background information your letter states:

"The mental health center will not be an autonomous facility. It will be an integral part of the central department of mental health, its funds being a portion of those appropriated to the central department. It will have a Superintendent as its professional and administrative head, but will not have a Board of Trustees, as do State Hospitals under the control of the department.

"The mental health center plans to provide a program of mental

health services to the Lowell community consisting of, but not restricted to the following:

In patient services; Out patient services; Partial hospitalization services; (i.e. day care, night care, weekend care); Emergency services; Consultation and educational services; Diagnostic services; Rehabilitative services; Pre-care and After-care services; Training; Research and evaluation.

"The mental health center at Lowell will have available forty (40) beds for adult patients in residence, plus a few additional beds for children.

* * * * *

"It can be foreseen that at the Lowell Mental Health Center situations will arise in the course of treatment programs when it will be in the best interest of certain patients that they be committed for a period of care and observation, or for an indefinite period for treatment or custody, or that they be received into the mental health center for a period of temporary care.

"It also is probable that certain persons may desire to submit themselves voluntarily for a period of time, for treatment in the mental health center. The question has arisen whether or not there is sufficient statutory authority in Chapter 123 of the General Laws, as amended, to do this."

In view of this information, you ask the following questions:

"1. Is the Lowell Mental Health Center a State Hospital, or 'other state institution' as defined in Section 1 of Chapter 123, of the General Laws, as amended?

"2. May persons be involuntarily committed or received at the Lowell Mental Health Center for periods of care and observation, or for indefinite periods for treatment or custody, as provided in Chapter 123 for State Hospitals under the control of the Department of Mental Health?

"3. May persons who submit themselves voluntarily for a period of time for treatment in the mental health center be accepted, as provided in Chapter 123 for State Hospitals under the control of the Department of Mental Health?"

I shall treat all of these as one question. In essence you ask whether the new medical center at Lowell is a State hospital for the care of the mentally ill within the purview of G. L. c. 123. If it is, involuntary commitments may be made or voluntary admissions accepted to this medical center as to other hospitals (see G. L. c. 123, § 25).

Chapter 123 contains no specific definition of a "mental health center." The provisions of G. L. c. 123, § 29(f) state:

"They [trustees of state hospitals] may encourage the establishment of mental health centers or clinics in any community and inform the public of measures that may be taken to prevent mental disease and thus reduce mental hospital admissions."

This would seem to indicate that the Legislature thought of mental health centers as types of "clinics," in which temporary, out-patient care was to be given to patients who, without such care, would need hospitalization. [See *Burke v. John Hancock Mutual Life Insurance Company*, 290 Mass. 249, 304, which distinguishes between hospitals and dispensaries.]

However, it is my opinion that § 29 is not controlling as to the legislative intent to define "mental health centers." I note that in G. L. c. 123, § 25 the Massachusetts Mental Health Center is listed among several hospitals (*e.g.*, Worcester State Hospital, Danvers State Hospital) as a state institution under the control of the Department of Mental Health. Furthermore, the definition of "state hospital" to include any "state colony, state school or *other state institution* under the control of the department" is certainly broad enough to include mental health centers. [Emphasis supplied.]

Whether a particular institution is classified as a hospital for purposes of voluntary admission or involuntary commitment should, in the absence of a legislative intent to the contrary, depend largely upon the facilities available. "A hospital is an institution for the reception and treatment of sick or injured, an asylum for the reception of the insane." *Crain v. Louisville*, 298 Ky. 421, 424. *Noble v. First National Bank of Anniston*, 241 Ala. 85, 87. *Bennett v. Bennett*, 27 Ill. App. 2d 24, 30. *Cf. Salvation Army of Massachusetts, Inc. v. Board of Appeals of Boston*, 346 Mass. 492, 495. I assume on the basis of the information contained in your letter that the medical center at Lowell will function as a fully equipped hospital, dispensing the type of services which hospitals for the mentally ill customarily dispense. On this assumption I conclude that, within a district to be determined by the Department (see G. L. c. 123, § 10), patients may be voluntarily admitted (G. L. c. 123, § 86 *et seq.*), or involuntarily committed (see, *e.g.*, G. L. c. 123, § 50) to the medical center at Lowell upon its completion.

I attach a proviso to this opinion. Certain sections of G. L. c. 123 provide for the commitment of persons to specific institutions. See, for example, § 103 providing for the commitment of certain insane male prisoners to the Bridgewater State Hospital. Nothing in this opinion should be read as authorizing the commitment of persons under such sections to the medical center at Lowell or to any institution other than that specified in the appropriate section.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The requirements of the federal Highway Beautification Act of 1965 (23 U.S.C. §§ 131, 319), which as it relates to roads other than state highways, directs the Department of Public Works to expend state funds for "the construction of needed improvements on other through routes not designated as state highways". Chapter 679 of the Acts of 1965 does not authorize expenditures for the purposes of the federal Highway Beautification Act of 1965.

MARCH 2, 1966.

HON. FRANCIS W. SARGENT, *Commissioner of Public Works.*

DEAR SIR:—You have requested my opinion as to whether expenditures for the purpose of the Highway Beautification Act of 1965 (23 U.S.C. §§ 131, 319) may be charged to the account established by St. 1965, c. 679 [An Act Relative To The Accelerated Highway Program].

Chapter 679 of the Acts of 1965 is a legislative directive to your Department:

" . . . to expend a sum, not to exceed three hundred and twenty million dollars, for projects for the laying out, construction, reconstruction, resurfacing, relocation or improvement of highways . . . and for construction of needed improvements on other through routes not designated as state highways. . . ."

With regard to highways which are "through routes not designated as state highways," your Department is to construct needed improvements; the General Court has authorized expenditure of portions of \$320,000,000 for such improvements. Such through routes which are not designated as state highways include the Federal Interstate Highway.

The Federal legislation to which you have referred, namely, 23 U.S.C. §§ 131, 319, addresses itself to the very real problem of unsightliness along this country's highways. The congressional statement of policy takes cognizance of this problem.

"The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."

23 U.S.C. § 131 (a).

Accordingly, the Highway Beautification Act of 1965 is intended to control outdoor displays, signs and devices which are within 660 feet of the nearest edge of the right of way of the roads referred to and which are visible from the main way.

Effective control means, in the terms of the statute, that such displays, signs and devices are, after January 1, 1968, to be limited to three types: traffic and scenic or historical notices; advertisements for sale of the property upon which the sign is located; and advertisements of activities taking place on the property where the sign is located. Clearly, many signs that are now in place must be removed by January 1, 1968, should the Commonwealth act pursuant to the Highway Beautification Act of

1965. Provision is also made for the shielding of junkyards by fences or trees from public view [see 23 U.S.C. § 131(c)]. Use of the zoning power to regulate signs and junkyards is a feature of the Act (although junkyards in industrial zones are exempted from the statute's operations), [23 U.S.C. §§ 131(d) and (g)]. Additionally, as your letter states, qualification for all the federal funds to which the Commonwealth might be entitled involves the preparation of a study. 23 U.S.C. § 302 requires your Department to make certain studied evaluations in conjunction with the Secretary of Commerce.

The State, and in particular the state agency charged with highway development, is the instrumentality for carrying on the outlined control sought. The federal-aid highway funds apportioned to a state pursuant to 23 U.S.C. § 104 may be reduced by ten per cent should a state fail to provide for effective control of those problems which the Act seeks to regulate. As a matter of law, however, your Department may not lawfully act beyond the authority granted to it by the Legislature. Consequently, it must be determined whether the statutes which apply to the Department of Public Works authorize the type of action contemplated by the Highway Beautification Act of 1965.

It is my opinion that the requirements of the Highway Beautification Act of 1965 are not encompassed within the terms of St. 1965, c. 679. Chapter 679, as it relates to roads other than state highways, directs the Department to expend state funds "for [the] *construction* of needed improvements *on* other through routes not designated as state highways." [Emphasis supplied.] Many of the provisions of 23 U.S.C. §§ 131, 319 will result in removal rather than "construction." (In so far as these removals would be a taking of property by eminent domain, your Department does not have statutory authority to make such takings adjacent to highways solely for the preservation of natural beauty. See Opinion of the Attorney General, October 5, 1965.) A possible exception is 23 U.S.C. § 131(c) which provides that junkyards "shall be screened by natural objects, plantings, fences, or other appropriate means. . . ." Such screening could conceivably involve the process of "construction." However, all of the construction and improving to be done pursuant to St. 1965, c. 679 is to be done *on* the roads specified. The federal legislation at issue concerns itself with an area that is beyond the confines of the highway. The Highway Beautification Act of 1965 addresses itself to "the effective control . . . of outdoor advertising signs, displays, and devices which are *within six hundred and sixty feet of the nearest edge of the right of way*. . . ." [Emphasis supplied.] There is no indication in c. 679 that improvements are to be made outside of the right of way. Indeed, the legislation speaks only of "improvements *on* [the] through routes. . . ." [Emphasis supplied.]

Accordingly, for the reasons stated above, it is my opinion that c. 679 of the Acts of 1965 does not authorize expenditures for the purposes of the federal Highway Beautification Act of 1965.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Instructions issued by the Commissioner of Correction to the Superintendents of the Correctional Institutions of the Commonwealth to the effect that persons returned to prison after parole violations must serve a period of six months before sentences may be reduced under c. 127, § 129 are correct.

MARCH 2, 1966.

HON. JOHN A. GAVIN, *Commissioner of Correction.*

DEAR COMMISSIONER GAVIN:—You have requested my opinion with respect to the calculation of good conduct deductions and discharge dates pursuant to a recent amendment to G. L. c. 127, § 129. Section 3 of c. 884 of the Acts of 1965, which becomes effective on April 6, 1966, amended the third paragraph of c. 127, § 129 by adding the following sentence:

"A prisoner released on parole by the parole board, who has failed to observe all the rules of his parole and has been returned to a correctional institution for the violation of his parole, shall not receive deductions described in this section for any of the first six months after he is returned to the correctional institution." [Emphasis supplied.]

You have indicated that the ambiguous phrasing of the new provision has caused your Department substantial difficulty in determining its proper application. Accordingly, you have asked for my interpretation as to the method which is to be used in computing good conduct credits in cases in which paroles have been revoked and parolees have been returned to prison.

Chapter 127, § 129 provides that every prisoner "whose record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under his sentence. . . ." The statute proceeds to set forth the method to be used in computing such deductions. Deductions for good behavior are considered part of the sentence imposed by the Court and must be recognized and granted.

Lembersky v. Parole Board of the Department of Correction, 332 Mass. 290, 294

It has been the practice of the Department of Correction to calculate good conduct credits immediately upon a given prisoner's confinement, and to reduce his sentence accordingly. The time deducted is of course subject to forfeiture in the event that the prisoner does not conform to good conduct requirements. I have indicated in an earlier opinion that this method of computation is correct. (See Opinion of the Attorney General to the Department of Correction, dated January 15, 1964.)

Given the requirement of good conduct deductions, and the method of computation called for by the statute, application of the recent amendment could result in a substantial degree of confusion. It appears that there are two possible interpretations of St. 1965, c. 884, § 3, each of which I will consider. One interpretation involves a literal reading of the

amendment, but produces a result which does not appear to reflect the intentions of the General Court. The other, although not so strict a construction of the language used, does, in my opinion, reach the result which the Legislature actually contemplated.

The amendment in question states that a prisoner who has violated the conditions of his parole, and who has accordingly been returned to prison, "shall not receive deductions . . . for any of the first six months after he is returned to the correctional institution." A literal reading of this language indicates that the Legislature sought only to deprive the prisoner in question of good conduct credits which might possibly accrue during the six-month period subsequent to his return to the institution. The language does not reveal any intention to interfere with, or otherwise affect, other good conduct deductions to which the prisoner might be entitled.

This interpretation will in some instances lead to an anomalous result. Paroles ordinarily occur during the latter part of a given sentence. By this time, the prisoner may well have accumulated a large amount of good conduct credit. He of course receives no good conduct credit during the period of his parole. But, upon return to the institution after parole has been revoked, he is entitled to have good conduct deductions calculated for the remainder of his sentence, and to have the said sentence reduced accordingly. The amendment in question (St. 1965, c. 884, § 3), if read literally, provides only that no good conduct deductions be credited for the first six months after the prisoner's return to the institution. Even omitting deductions for this six-month period, the remaining deductions will, in certain cases, be sufficient to authorize an immediate discharge. Consequently, by violating the conditions of his parole, the prisoner in such a case actually receives a final discharge at a date earlier than what his discharge date would have been had he complied with the rules and regulations of the Parole Board.

I do not believe that the Legislature intended this result. It is my opinion that the alternative interpretation reflects more closely the intention of the General Court. It would appear that the language of the amendment to the effect that the prisoner "shall not receive deductions . . . for any of the first six months after he is returned to the correctional institution" was intended to indicate that—in the event of violation of parole—good conduct deductions should not be calculated so as to authorize discharge of the prisoner during the first six months after his return to the institution. This can be accomplished by suspending the calculation of good conduct credits for the term which remains after the end of the parole period until the six-month period in question has expired. If, upon the calculation of credits at that time, the prisoner is entitled to a sufficient reduction in sentence, he may of course be discharged immediately; but he has at least suffered some penalty for having violated the conditions of his parole.

The law in question has been ambiguously drafted, and final determination of the legislative intention may well require a further amendment to the statute. Absent further legislative definition, however, I believe that a construction which rewards a parolee for violation of the conditions of his parole should be avoided. Such cannot have been the

intention of the General Court. Accordingly, it is my opinion that the instructions issued by you to the Superintendents of the Correctional Institutions of the Commonwealth to the effect that persons returned to prison after parole violations must serve a period of six months before sentences may be reduced under c. 127, § 129 are correct.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Department of Corporations and Taxation may not legally terminate a lease executed on November 30, 1961, between it and the Boston Common Realty Trust on the basis that no monies have been appropriated for the balance of the term.

With or without an appropriation, the Commonwealth will be liable for rents under the lease after April 30, 1966.

The Commonwealth may not lawfully terminate its agreement because of the failure of the lessor adequately to maintain the premises pursuant to Section 7.a. of the lease.

MARCH 3, 1966.

HON. JOHN J. MCCARTHY, *Commissioner of Administration, Executive Office for Administration and Finance.*

DEAR COMMISSIONER MCCARTHY:—This is to acknowledge your letter of February 18, 1966, in which you propounded three questions concerning a lease executed on November 30, 1961, between the Commissioner of Corporations and Taxation and the Boston Common Realty Trust, covering the premises located at 80 Mason Street, Boston.

You have asked:

“1. Whether the Department of Corporations and Taxation may legally terminate the aforesaid lease as of April 30, 1966 on the basis that no monies have been appropriated and there will be no available appropriations after that date to pay the rent prescribed in the lease.

“2. Whether, lacking available appropriations, the Department of Corporations and Taxation or the Commonwealth of Massachusetts will be legally liable for rents under this lease after April 30, 1966.

“3. Whether the failure of the lessor to adequately maintain the premises pursuant to Section 7.a. of the lease will legally permit the Department of Corporations and Taxation to terminate the lease.”

The lease in question was executed pursuant to G. L. c. 8, § 10A, which provides that:

“The commonwealth, acting through the executive or administrative head of a state department, commission or board and with the approval of the superintendent and of the governor and council and of the commissioner of administration, may lease for the use of such department, commission or board, for a term not exceeding five years, premises outside of the state house or other building owned by the commonwealth,

if provision for rent of such premises for so much of the term of the lease as falls within the then current fiscal year has been made by appropriation. . . ." [Emphasis supplied.]

From the information which you have furnished me, I note that "provision for rent of such premises for so much of the term of the lease as falls within the then current fiscal year has been made by appropriation. . . ." See Accounts #1201-03-16 and #1202-02-16 of fiscal year 1962. This requirement of c. 8, § 10A having been met, the Commissioner of Corporations and Taxation could and did in fact enter into a valid lease for a term of five years. Whether future appropriations would be made would not affect the validity of this obligation.

Section 5 of the lease, after reciting the yearly rental, states:

"All obligations of the Lessee hereunder shall be subject to available appropriations."

The Supreme Judicial Court has recently considered the effect of a similar lease containing a "subject to available appropriations" phrase. In *United States Trust Company v. Commonwealth*, 1965 Mass. Adv. Sh. 107, suit was brought on a five-year lease executed by the United States Trust Company and the Commissioner of Corporations and Taxation covering the premises located at 40 Court Square.

The Commonwealth had agreed, "subject to available appropriation," to restore the demised premises prior to termination of the lease. The lease terminated, yet no restoration was done. The Court, on demurrer, rejected the Commonwealth's contention that, as a matter of law, an appropriation to defray the cost of restoration was a condition precedent to the validity of that obligation. Said the Court at pages 112-113:

"An examination of the original declaration on file in the Superior Court discloses that these words [subject to available appropriation] were added in typewriting by caret to a prepared form. Other than to state that *the words do not create a condition precedent to obligation*, we shall not speculate about them without knowing the circumstances of the negotiation and execution of the lease. . . ." [Emphasis supplied.]

My answer to your first question, therefore, is that you may not legally terminate the lease in question on the basis that no monies have been appropriated for the balance of the term.

In answer to your second question, it is my opinion that, with or without an appropriation, the Commonwealth will be liable for rents under this lease after April 30, 1966. Whether the Commonwealth will ever be able to make payment for same, however, depends upon appropriation by the Legislature. See Opinion of the Attorney General dated January 19, 1960:

"Although a lease for several years may be negotiated on behalf of the Commonwealth as lessee, even though the rent for future years has not then been appropriated, the right of a lessor to be paid such future accruing rents is dependent on future appropriations being made by the Legislature. Even if suit is instituted against the Commonwealth for such future rents, recovery is expressly limited by G. L. c. 258, § 3,

which provides that judgments against the Commonwealth shall be paid by the Treasurer ‘. . . from any appropriations made for the purpose by the General Court.’ ”

In your third question, you ask “Whether the failure of the lessor to adequately maintain the premises pursuant to Section 7.a. of the lease will legally permit the Department of Corporations and Taxation to terminate the lease.”

This section of the lease provides for the general maintenance and servicing of the premises with a further provision that if a dispute arises as to what is “adequate,” the dispute will be submitted to a certain form of arbitration. A breach of this covenant for maintenance and servicing of the premises will usually make the premises less desirable. However, the fact that this diminution in enjoyment resulted from a breach of the lessor’s covenants, while it will entitle the tenant to damages of a limited nature, will not—in and of itself—justify avoidance by the lessee of its further responsibilities under the lease.

Accordingly, it is my opinion that the Commonwealth may not lawfully terminate its agreement because of the failure of the lessor adequately to maintain the premises pursuant to Section 7.a. of the lease.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Despite the failure of the Legislature to repeal G. L. c. 15, §§ 9, 13 and 15A, the division to which these sections refer must go out of existence with the reorganization of the Department of Education pursuant to St. 1965, c. 572. However, the Division of Youth Services, created by G. L. c. 120, § 4A, continues, with the same functions as before, the provisions of St. 1965, c. 572 notwithstanding.

All license requirements concerning private correspondence schools, and all authority to grant licenses, contemplated by G. L. c. 75C, remain in effect as if St. 1965, c. 572 had not been enacted.

MARCH 9, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—You have requested my opinion as to the interpretation of several sections of St. 1965, c. 572, popularly known as the Willis-Harrington Act.

Your first question and the appropriate background information provided therewith reads as follows:

“1. Section 4 of Chapter 15 of the General Laws sets forth the present divisions in the Department. Section 8 of Chapter 572 repeals Section 4 and becomes effective when the new Board of Education is organized. (Section 43 of Chapter 572.) Section I-F of Chapter 572 states that the new Board shall establish five divisions, two of which are to be

headed by Associate Commissioners and three by Assistant Commissioners.

"Chapter 15, Section 9 of the General Laws which refers to the Division of Library Extension was not repealed although it is one of the divisions listed in Section 4 of Chapter 15. Section 13 of Chapter 15 of the General Laws which refers to the Division of the Blind was not repealed although this division is listed under Section 4 of Chapter 15. Chapter 15, Section 15A refers to the Division of Special Education which section was not repealed although this division is listed in Section 4 of Chapter 15. Chapter 120, Section 4A refers to the Division of Youth Services in the Department of Education, and states that this division is in the Department but not under its control. This section was not changed.

"In view of the fact that the aforementioned sections were not repealed or changed by Chapter 572, what is their status especially since Section I-F of Chapter 572 provides for the establishment of only five divisions?"

Your statements as to the provisions of the statutes which you cite are correct.

It is my opinion that despite the failure of the Legislature to repeal G. L. c. 15, §§ 9, 13 and 15A, the divisions to which these sections refer must go out of existence with the reorganization of the Department of Education pursuant to St. 1965, c. 572. St. 1965, c. 572, § 8 upon its effective date clearly repeals G. L. c. 15, § 4, which is the source of legislative authority for the existence of these divisions. Furthermore, c. 572, § 1F provides for the existence of five divisions: "(a) curriculum and instruction, (b) administration and personnel, (c) research and development, (d) school facilities and related services, and (e) state and federal assistance." St. 1965, c. 572 does not provide for any other divisions in the Department.

In the recent case of *Doherty v. Commissioner of Administration*, 1965 Mass. Adv. Sh. 1367, 1370, the Supreme Judicial Court stated:

"... Although the principle [of implied repeal] is one which the court, in deference to the Legislature, does not regard with favor and applies with caution, it has its proper place in judicial construction of legislative enactments. It derives from the basic concept that it is the duty of the court to ascertain the legislative intent and to effectuate it. The test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand. *Commonwealth v. Bloomberg*, 302 Mass. 349, 352. Repugnancy and inconsistency may exist when the Legislature enacts a law covering a particular field but leaves conflicting prior prescriptions unrepealed. *Homer v. Fall River*, 326 Mass. 673, 676, and cases cited. *Bond Liquor Store, Inc. v. Alcoholic Beverages Control Commn.*, 336 Mass. 70, 74. Where such a conflict does appear it is the court's duty to give effect to the Legislature's intention in such a way that the later legislative action may not be futile. The earlier enactment must give way. *Sullivan v. Worcester*, 346 Mass. 570, 573, and cases cited."

This language is clearly applicable to the legal problem raised by your first question. To the extent that G. L. c. 15, §§ 9, 13 and 15A would appear to continue the existence of the Divisions of Library Extension, of the Blind, and of Special Education after the effective date of St. 1965, c. 572, § 8, these sections of c. 15 must be regarded as impliedly repealed.

However, the Division of Youth Service, created by G. L. c. 120, § 4A, is on a different footing from the divisions created by G. L. c. 15, § 4. As you correctly point out, "this Division is in the Department but not under its control." I assume that this arrangement was established to comply with Art. 66 of the Articles of Amendment of the Constitution of Massachusetts. See 1949 Report of the Attorney General, pp. 17, 18. Its existence was in no way dependent on G. L. c. 15, § 4. Although St. 1965, c. 572, § 1F could be read as a repeal of G. L. c. 120, § 4A, repeal by implication is—as indicated above—not favored. *Hersh v. Police Commr. of Boston*, 319 Mass. 428, 432 and cases cited. I am of opinion that the Division of Youth Service continues, with the same functions as before, the provisions of St. 1965, c. 572 notwithstanding.

Your second question and the appropriate background information provided therewith read as follows:

"2. Section I-D of Chapter 15 which provided for the appointment of an Assistant Commissioner of Education to be in charge of the education of the mentally handicapped, physically handicapped and the emotionally disturbed children was repealed. Dr. Philip G. Cashman is the Assistant Commissioner of Special Education in this area.

"Section 44 of Chapter 572 provides in part, 'The classification, title and salary of each member of the professional staff of the department of education and the state colleges immediately prior to the effective date of this act shall remain in effect until changed by their respective boards.' Dr. Cashman has been in the Department for many years and is a veteran.

"What is Dr. Cashman's status in view of Section 44 of Chapter 572, and the fact that Chapter 15, Section 15A which provides for a Division of Special Education has not been repealed or changed but is not one of the five divisions listed in Section I-F of Chapter 572?"

The repeal of G. L. c. 15, § 1D by St. 1965, c. 572, § 2, for reasons discussed in my answer to your first question, clearly abolishes the position of "assistant commissioner of education . . . in charge of the education of mentally handicapped, physically handicapped, and emotionally disturbed children." This position was created by St. 1964, c. 712, § 1, and *not* by St. 1954, c. 514, § 2, which originally inserted G. L. c. 15, § 15A providing for the Division of Special Education. Since the position held by Dr. Cashman no longer exists, neither he nor anyone else can be said to hold that position. *Nichols v. Commissioner of Public Welfare*, 311 Mass. 125, 130.

Inasmuch as Dr. Cashman's "classification, title and salary" remain in effect until changed by the Board, he should receive the same salary as he received prior to the effective date of St. 1965, c. 572 and should continue to hold the title of Assistant Commissioner of Education until

the Board decides otherwise. The term "classification," I assume, merely refers to broad classes of employees (*e.g.*, laborers, professionals) categorized for seniority and other purposes. *Ault v. Hurley*, 291 Mass. 176, 177. See *McDonald v. City Manager of Fall River*, 273 Mass. 368, 370; *Deveney v. Boston*, 223 Mass. 270; *Attorney General v. Tillinghast*, 203 Mass. 539. See also G. L. c. 30, §§ 45-50; c. 31, § 3. Accordingly, it would appear that Dr. Cashman's classification prior to the effective date of c. 572 continues thereafter until changed as indicated above.

Your third question (in two parts) and the relevant background information provided therewith read as follows:

"3. The Division of University Extension has operated under the provisions of Chapter 69, Section 7 of the General Laws and under said section this division conducted university extension classes and correspondence courses on all levels, such as, the college graduate level, the college undergraduate level, the high school level, and the non-credit level wherein there are no educational requirements. . . .

"Section 7 of Chapter 69 of the General Laws under which all the above courses were conducted was changed by Chapter 572, Section 9 by striking out the word 'department' and substituting the phrase 'board of higher education.'

"Under Section I-D of Chapter 572 it is stated in the last two sentences 'The Board' (referring to the Board of Higher Education) 'shall establish and maintain university extension courses.' 'The board shall establish and maintain citizenship classes for the foreign born, teacher training, training for veterans in the division of vocational education, fellowship or loan programs, and other voluntary, *post* high school, occupation-oriented programs as it shall deem necessary.' [Emphasis supplied.]

"Under Section 31 of Chapter 572 which refers to the University of Massachusetts, it is stated, 'The university shall offer the adult education services of the university extension program.'

"In Section I-F of Chapter 572 in the next to the last sentence (referring to the Board of Education) it is stated in part, 'The board shall also establish audio-visual service, day care service and adult education facilities not collegiate in nature.'

"Some correspondence courses which have been operated by the Division of University Extension of the Department of Education under Chapter 69, Section 7 of the General Laws require a high school diploma or its equivalent. All correspondence schools located in Massachusetts and salesmen operating therein are required to be licensed by the Commissioner of Education in the Department of Education under Chapter 75C. If the correspondence courses which require a high school diploma or its equivalent leave the Department and go to the Board of Higher Education, what is the effect of Chapter 75C which has not been changed relative to licensing?

"In view of the aforementioned changes in the law, what courses remain in the Department of Education and what functions will come

under the jurisdiction of the Board of Higher Education and the University of Massachusetts?"

In reply to the first part of this question, it is clear that G. L. c. 75C, providing for the licensing of private correspondence schools (not "all" such schools, as you state in your request), has not been amended or repealed by St. 1965, c. 572. All license requirements and all authority to grant licenses, contemplated by G. L. c. 75C, remain in effect as if St. 1965, c. 572 had not been enacted.

The last paragraph of St. 1965, c. 572, § 1D, which is quoted in your letter, requires the Board of Higher Education, established by c. 572, § 1A, to offer a broad spectrum of courses which would generally not be part of a formal degree—or diploma-oriented course of study. The penultimate paragraph of § 10 charges the Board to "establish and maintain university extension courses." The University of Massachusetts under c. 572, § 31 "shall offer the adult education services of the university extension program." (The University of Massachusetts may have offered extension courses prior to the enactment of c. 572, since G. L. c. 69, § 7 permitted the Department of Education to "cooperate with existing institutions of learning in the establishment of university extension and correspondence courses.") I assume that the "university extension program" in § 31 refers to the "university extension courses" of § 1D. In general, it seems to have been the intention of the Legislature that degree-oriented extension courses, or such courses as are usually oriented toward persons working toward degrees or other academic status, be offered by the University and that other extension courses be offered directly by the Board.

However, the Board of Higher Education has wide administrative authority over public higher education under St. 1965, c. 572, § 1D, which states in part:

"The purposes of the board shall be to support, facilitate, and delineate functions and programs for public institutions or of higher education in the commonwealth segments of such institutions, to allocate to them the responsibility and autonomy to discharge such functions and programs, and to plan and develop efficient and effective coordination among them; provided, however, that the determination of individual courses within a general program of study shall be the sole responsibility of each public institution of higher education.

"The board shall promote the best interests of all public higher education throughout the commonwealth.

"The board shall plan and support orderly and feasible expansion of each segment of public higher education and of public higher education as a whole. The board shall have the power to receive allotments to the commonwealth under federal programs of aid to public higher education, and to disburse such funds in accordance with official plans, not to include grants to individuals, or for projects carried on at any given institution.

"The board shall coordinate through its staff such educational services as are common to all segments and institutions of public higher education."

In view of this broad power, I assume that the determination of which courses shall be offered through the university and which shall be offered directly by the Board is largely a matter for the Board's discretion. See *Ault v. Hurley, supra*.

Under St. 1965, c. 572, § 1F the Board of Education is authorized to establish "adult education facilities not collegiate in nature." It is not clear whether the "facilities" in question are merely inanimate objects such as buildings and classrooms to be staffed by the Board of Higher Education (see *Sloss-Sheffield Steel & Iron Co. v. Smith*, 185 Ala. 607, 611) or whether the word in this context includes teachers and administrators (see *State ex rel. Knight v. Cane*, 20 Mont. 468, 471, 475-476). Because of the ambiguity of this term, it is particularly appropriate for administrative interpretation. See *Cleary v. Cardullo's Inc.*, 347 Mass. 337, 344.

If the Board of Education should decide that the Legislature intended for it to staff the facilities mentioned in c. 572, § 1F, the curriculum offered at these facilities should be generally equivalent to courses generally offered in primary or secondary schools. I assume that most of the students at these facilities will be adults who did not have an opportunity to receive twelve years of education. In general, it seems to have been the Legislature's intention that the reorganized Board of Education concern itself mainly with primary and secondary education in the Commonwealth. See St. 1965, c. 572, § 1G.

I am aware that regardless of efforts to separate divisional and departmental functions in the area of extension courses, some duplication of curriculum and facilities is probably inevitable. But without such duplication the broad beneficial purpose of the statute probably could not be realized.

Your fourth question and the background information provided therewith read as follows:

"4. Section 23 of Chapter 572 made a change in Section 22 of Chapter 74 of the General Laws in substance by striking out the words 'for vocational education' so that it would be the state Board or the Board of Education which would use the funds mentioned in said section. This section states 'That the state board may use the funds received under the act of Congress mentioned in section twenty as supplementary to state aid for salaries of teachers of vocational subjects in schools complying therewith. It may also use such funds (1), for salaries of teachers giving types of training selected by it as especially needing stimulus; or (2), for courses for the preparation of teachers of vocations selected by it; or (3), to arrange with schools and colleges to give the proper types of training to teachers of vocations under its supervision; or (4), to enable local school authorities to conduct, under its supervision, classes for the training of vocational teachers; or (5), for travel as provided for under said act of Congress. Such payments shall be subject to conditions prescribed by said board.'

"Under Section I-D of Chapter 572 which refers to the Board of Higher Education, it states as follows in the last sentence, 'The board shall establish and maintain citizenship classes for the foreign born, teacher training, training for veterans in the division of vocational

education, fellowship or loan programs, and other voluntary, post high school, occupation-oriented programs as it shall deem necessary.'

"How can this section as far as teacher training be reconciled with the previous mentioned section, namely, Section 23 of Chapter 572 of the Acts of 1965 which amended Section 22 of Chapter 74 of the General Laws?"

I see no conflict in St. 1965, c. 572, between the provisions of § 23 and those of § 1D relating to teacher training, since the latter refer to teacher training generally and the former to the training of vocational teachers. Nothing in § 1D authorizes the Board of Higher Education to use the federal funds referred to in St. 1965, c. 572, § 20—i.e., "funds allotted to the commonwealth from appropriations made under the Act of Congress approved [February 23, 1917] . . . relating to vocational education in agriculture, distributive occupations, household arts and trades and industries." The Board of Education, on the other hand, is clearly authorized to use these funds. Although it appears that the authority of the Board of Higher Education under § 1D to "establish . . . teacher training" is broad enough to include vocational training, I assume that this Board will as far as possible avoid duplication of facilities and courses in the training of vocational teachers offered pursuant to § 23 and subsidized, at least in part, by federal aid.

I shall not repeat your fifth question verbatim. In essence, you state that the Department now sponsors courses in electronics, machine tool and design, mechanical technology, practical nursing, dental technology, and medical secretarial skills. You add:

"The Department sponsors Supervisor-Instructor training courses for the benefit of industry, hospitals, business establishments, etc.; also courses on the Techniques of Supervision, Training for Conference Leadership, and Work Simplification Courses. The various establishments select the people to be trained. . . ."

You asked whether the Board of Education should now transfer to the Board of Higher Education the responsibility for these courses.

According to your letter, enrollment in several of these courses requires or usually requires a high school diploma. In any event, these courses are not related to adult primary and secondary education or to the training of vocational teachers. They seem to fall well within the scope of the programs to be established by the Board of Higher Education pursuant to the last paragraph of St. 1965, c. 572, § 1D. I conclude that the purposes of St. 1965, c. 572 will best be served by transfer of responsibility for these courses to the Board of Higher Education.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The lease of a military reservation is neither a "sale" or "transfer" within the meaning of St. 1955, c. 665, § 1. The power to lease a military reservation to the United States for military purposes remains in the Governor, although the power to dispose of such a reservation "by sale, transfer or otherwise" is in the Military Reservations Committee (upon recommendation of the Commissioner of Administration and approval by the Governor.)

The advice and consent of the Executive Council is no longer needed with regard to the lease, sale, disposition or transfer of any property owned by the Commonwealth, including military reservations.

MARCH 21, 1966.

MAJOR GENERAL JOSEPH M. AMBROSE, *The Adjutant General.*

DEAR GENERAL AMBROSE:—You have requested my opinion as to the authority of the Military Reservations Commission (see St. 1935, c. 196) to negotiate a lease of Otis Air Force Base to the Federal government, presumably for use by the armed forces of the United States. You ask two questions:

"1. May the Massachusetts Military Reservation (commonly known as Otis Air Force Base and/or Camp Edwards), be leased by the governor under the authority of General Laws Chapter 33, Section 114; or must any said lease be made by the Military Reservation Commission, on recommendation of the Commissioner of Administration with the approval of the governor as set forth by Chapter 665 of the Acts of 1955?

"2. Is the consent of the Council now required under either statute?"

I shall consider these questions separately. I quote St. 1955, c. 665, § 1:

"Upon recommendation of the commission on administration and finance and with the approval of the governor and council, the special military reservation commission established by section one of chapter one hundred and ninety-six of the acts of nineteen hundred and thirty-five, as most recently amended by chapter twenty of the acts of nineteen hundred and forty-one, is hereby authorized to dispose of, by sale at public auction, by sale or transfer to other agencies of the commonwealth, or by sale or transfer to political subdivisions of the commonwealth in which the properties are located any or all properties, including land and buildings, under the jurisdiction of said military reservation commission, which properties have been certified by it to be no longer necessary for its program. Upon like recommendation and with like approval, said military reservation commission may dispose of, by sale, transfer or otherwise, to agencies of the United States government any or all properties, including land and buildings, under its jurisdiction."

The last sentence of this statute gives the Commission power to "dispose of, by sale, transfer or otherwise, to agencies of the United States government any or all properties . . . under its jurisdiction." There is a decided conflict of authority as to whether the power to

"dispose of" property includes the power to grant a leasehold therein. Cases holding that the power to lease is subsumed under the power to "dispose of" include *United States v. Gratiot*, 14 Pet. 526, 537-538; *Hill v. Sumner*, 132 U.S. 118, 123-124, and *Illinois Life Insurance Co. v. Beifield*, 184 Ill. App. 582, 593-595. A contrary interpretation of the words "dispose of" was reached in *In re Hubbell's Trust*, 135 Iowa 637, 644. The Supreme Judicial Court of this Commonwealth in another context has said: "It is evident that the words 'disposed of' meant a complete divestment of title." *Lord v. Smith*, 293 Mass. 555, 562.

I am of the opinion that the lease of a military reservation is neither a "sale" nor a "transfer" within the meaning of St. 1955, c. 665, § 1. See Black's Law Dictionary (4th ed.), pp. 1503 and 1669. Whether the power to "dispose of . . . otherwise [than by sale or transfer]" includes the power to lease is difficult to determine on the face of the statute. In these circumstances it is permissible to resort to other statutes dealing with the same subject in order to interpret the statute under consideration. *Davis v. School Committee of Somerville*, 307 Mass. 354, 361. I consider G. L. c. 33, § 114, which states:

"The governor, with the advice and consent of the council, may lease to, or permit to be used by, the armed forces of the United States, military property belonging to the commonwealth, upon such terms and conditions as will fully protect the interests of the commonwealth." [Emphasis supplied.]

This statute is unambiguous. It was inserted by St. 1939, c. 425, § 1 and most recently amended by St. 1954, c. 596, § 1. Clearly, a military reservation owned by the Commonwealth is military property (*Northern Pacific Railway Co. v. United States*, 64 F. Supp. 1) which the Governor is empowered to lease to the "armed forces of the United States." To hold that St. 1955, c. 665, § 1 conferred upon the Military Reservations Commission the authority to lease Otis Air Force Base would be to countenance an implied partial repeal of G. L. c. 33, § 114. Repeal by implication is not favored. *Hersh v. Police Commissioner of Boston*, 319 Mass. 428, 432 and cases cited. Statutes dealing with the same or similar subjects should be interpreted "to the end that there may be an harmonious and consistent body of law" with "reasonable effect to both [statutes], unless there be some positive repugnancy between them." *Everett v. Revere*, 344 Mass. 585, 589 and cases cited. I conclude that the power to lease a military reservation to the United States for military purposes remains in the Governor, although the power to dispose of such a reservation "by sale, transfer or otherwise" is in the Commission (upon recommendation of the Commissioner of Administration and approval by the Governor).

Section 4 of St. 1964, c. 740 provides as follows:

". . . so much of each provision of the General Laws and of any special law as requires the *advice and consent of the council* with respect to any action or omission to act by the governor or by any officer, agency or instrumentality in the executive department, including without limitation, any deposit, borrowing, loan, investment, endorsement, validation, surety or bond, or any *lease*, license, purchase, acquisition, *sale*, convey-

ance, *disposition or transfer*, or any contract or other agreement, or any permit or license, or any rules or regulations, is hereby repealed." [Emphasis supplied.]

The emphasized language speaks for itself. The "advice and consent" of the Council is no longer needed with regard to the lease, sale, disposition or transfer of any property owned by the Commonwealth, including military reservations. Accordingly, I answer your second question in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A statute repealed and simultaneously re-enacted remains in full force and effect. The State Sanitary Code, adopted by the Department of Public Health under the provisions of § 5 of Chapter 111, M.G.L., continue in full force and effect, the provisions of St. 1965, c. 898, § 1, notwithstanding.

MARCH 21, 1966.

HON. ALFRED L. FRECHETTE, M.D., *Commissioner of Public Health*.

DEAR DOCTOR FRECHETTE:—You have requested my opinion as to the status of the State Sanitary Code (adopted by the Department of Public Health) in view of St. 1965, c. 898. This code, which you state is "being enforced by local boards of health" and is "the basis of local programs of housing code enforcement by numerous municipalities," was adopted pursuant to the second paragraph of G. L. c. 111, § 5, which reads:

"Said department [of Public Health] shall adopt and may from time to time amend, public health regulations to be known as the state sanitary code, which may provide penalties for violations thereof not exceeding five hundred dollars for any one offence. Said code shall become effective and have the force of law upon filing with the state secretary or at such later date as may be specified by the department. The code shall deal with matters affecting the health and well-being of the public in the commonwealth in subjects over which the department takes cognizance and responsibility. Nothing contained in the code shall be in conflict with any general or special laws. This section shall not be deemed to limit the right of any board of health to adopt such rules and regulations as, in its opinion, may be necessary for the particular locality under its jurisdiction; provided, such rules and regulations do not conflict with the laws of the commonwealth or the provisions of the code."

As you point out, St. 1965, c. 898, § 1 "repealed" the above language by repealing all of G. L. c. 111, § 5 after the first paragraph. However, St. 1965, c. 898, § 3 re-enacted substantially the same language as appeared in paragraph 2 of c. 111, § 5, making it part of G. L. c. 111, § 127A. In view of this action by the Legislature, you ask three questions:

"1. Will the Articles of the State Sanitary Code, adopted by the

Department under the provisions of Section 5 of Chapter 111, remain effective after April 7, 1966, the effective date of Chapter 898 of 1965?

"2. If the answer to the above question is in the negative, will it be necessary for the Department to advertise, hold a hearing, and then adopt these Articles of the Sanitary Code in accordance with the provisions of the new Section 127A of Chapter 111, or could the Department simply vote to adopt the Articles and then file them with the Secretary of State?

"3. Could any other action be taken which would validate the Articles of the State Sanitary Code and avoid serious and costly interruption to the local enforcement programs?"

Only the first question need be considered. It is a well-established rule of law that a statute "repealed and simultaneously re-enacted" remains in full force and effect. *Wayne v. Bureau of Private Investigators & Adjusters*, 201 Cal. App. 2d 427, 439. *Bear Lakes & River Water Works & Irrigation Co. v. Garland*, 164 U.S. 1, 11-12. *Florida Central & Peninsular RR Co. v. Foxworth*, 41 Fla. 1, 59. *Heath v. State*, 173 Ind. 296, 298. *Van Dyke's Appeal*, 217 Wis. 528. *Horack, Sutherland Statutory Construction* (3rd ed.), § 2036. See *Commonwealth v. Anselvich*, 186 Mass. 376, 379-380; *Crawford, Statutory Construction*, § 322. I conclude that the State Sanitary Code continues in full force and effect, the provisions of St. 1965, c. 898, § 1 notwithstanding. It is, accordingly, unnecessary to consider the other questions contained in your request.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Superintendent of the Massachusetts Correctional Institution at Bridgewater may legally grant permission to make an educational film within that institution.

MARCH 21, 1966.

HON. JOHN A. GAVIN, *Commissioner of Correction*.

DEAR COMMISSIONER GAVIN:—In your recent request for an opinion, you provided the following information:

"I have been asked by Frederick Wiseman of Cambridge for permission to make an educational film about M.C.I. Bridgewater. Mr. Wiseman is an attorney and an experienced film-maker. I have told him that I would give him permission to make the film. Provided, however, that the rights of the inmates and patients at Bridgewater are fully protected. Mr. Wiseman has assured me that he will only use the photographs of inmates and patients who are legally competent to sign releases and that he will obtain a written release from each inmate and patient whose photograph is used in the film."

In light of the above, you have asked whether you may legally grant Mr. Wiseman permission to make such a film.

I direct your attention to G. L. c. 125, § 14 (relating to the

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Massachusetts Correctional Institution, Bridgewater), which reads as follows:

"Subject to rules and regulations established by the commissioner and according to law, the superintendent shall be responsible for the custody and control of all prisoners in the correctional institution, and shall govern and employ them pursuant to their respective sentences until their sentences have been performed or they are otherwise discharged by due course of law, or they are removed by the commissioner, and shall also have the charge and custody of the institution and of the land, buildings, furniture, tools, implements, stock, provisions, and all other property belonging to it or within its precincts."

Unless your rules or regulations provide otherwise, the granting of the requested permission would be within the discretion of the Superintendent of the Institution at Bridgewater, who is a co-signer of your request.

There does not appear to be any provision, whether statutory, constitutional or common law, to the effect that a *consenting* inmate at the Institution may not be photographed (assuming that such inmate is mentally competent to give his consent). *Cason v. Baskin*, 155 Fla. 198, 200. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (C.C.A. 5) *cert. denied* 315 U.S. 823. *Pallas v. Crowley, Milner & Co.*, 323 Mich. 411, 417-418. See 138 A.L.R. 454, 461; 14 A.L.R.2d 762, 770. "The care of a jail [or correctional institution] is entrusted to the jailer, whether he is the sheriff or another [in the case of the Institution at Bridgewater, the Superintendent]. It is his duty . . . to maintain order, as well as to exclude intruders therefrom. In the execution of this last duty the jailer [or Superintendent] has a large discretion in determining at what time, under what circumstances, and what persons not having legal authority may be permitted to enter the jail, or to have access to the prisoners." 41 Am. Jur. 888. See *Laughlin v. Cummings*, 105 F.2d 71, 73; *Shields v. State*, 104 Ala. 35, 37-38. I conclude that the Superintendent may, if he deems it advisable, permit Mr. Wiseman to make his film at the Institution.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

If proper certification of the costs and charges called for by c. 7, § 30K is made by the Director of Hospital Costs and Finances, and if all other statutory conditions have been complied with, the rates promulgated by the Commissioner of Administration on February 16, 1966, have been properly established. Provision by the Director of additional information than required by c. 7, § 30K would not alter the fact that he has complied with the statutory mandate.

MARCH 22, 1966.

HON. JOHN J. MCCARTHY, *Commissioner of Administration*.

DEAR COMMISSIONER MCCARTHY:—On March 4, 1966, you submitted to me a request for my opinion upon five questions relating to the setting

of rates for reimbursement of hospitals, sanatoria and infirmaries for care of welfare patients under the provisions of G. L. c. 7, § 30K. Since I have rendered an opinion on this subject matter within the past month [see Opinion of the Attorney General to the Senate dated February 16, 1966], I believe that it is desirable to include a brief statement of recent activity with respect to the setting of the rates at issue. The questions which you have just posed may thus be placed in their proper context.

Much of the relevant information is contained in your letter. In August of 1965, having already established a set of rates under the provisions of c. 7, § 30K, you asked me to advise whether you could lawfully promulgate a second set of rates during that year in order more closely to reflect the statutory directive that the rates in question should be the equivalent of the lower of reasonable hospital costs or charges. I responded on August 30, 1965, by ruling that c. 7, § 30K authorized the promulgation of hospital rates for the care of welfare patients only once in a calendar year, and that accordingly any additional rates established by the Commissioner of Administration would be a nullity. This opinion has recently been upheld by a Justice of the Superior Court [see order by Moynihan, J., in the case of *Massachusetts General Hospital v. Commissioner of Administration*, Suffolk Superior Court No. 607,756].

In the first paragraph of your letter of March 4, 1966, you state that—on February 3, 1966—you certified under the provisions of c. 7, § 30K, “. . . to each of the various departments, boards, or commissions of the commonwealth purchasing care in . . . hospitals, sanatoria and infirmaries, or reimbursing cities or towns for such care purchased by them, . . . rates with respect to each such hospital, sanatorium and infirmary as will reflect reasonable hospital costs or charges made to the general public, whichever is the lower.” On February 10, 1966, the Senate of the Commonwealth adopted an Order requesting an opinion of the Attorney General with respect to the rates certified the previous week. The Order of the Senate contained the following statement of fact:

“ . . . it also appears that the Director of Hospital Costs and Finances has not certified to said Commissioner [of Administration] the costs and charges which in accordance with said section 30K it is provided should be so certified, but in lieu thereof, and by order of said Commissioner, by letter to said Director dated January 7, 1966, filed with the Commissioner projected or estimated ward costs and charges for the year commencing January 1, 1966.”

The Order of the Senate continued:

“In view of the foregoing are the rates so certified by said Commissioner legally and properly established in accordance with the statute?”

On February 16, 1966, as indicated above, I rendered an opinion in response to the questions posed by the Senate. This opinion, based upon the statement of fact provided by the Senate embodied in the previous paragraph, contained the following language:

“It is my opinion that when the General Court enacted the provisions of Chapter 7, section 30K it expected that the costs and charges certified by the Director to the Commissioner of Administration and examination

of presently available facts and figures, and not upon speculation as to future developments in hospital economics. The statute requires of the Director certification of concrete and reliable figures, and provides him with the necessary authority to acquire whatever data may be relevant to his determinations."

Thus, I advised the Senate that the Director of Hospital Costs and Finances could not lawfully project costs and charges for the year 1966, and that rates established by the Commissioner of Administration on the basis of such projected figures were invalid. Your present letter states: "Because the Order and opinion, based on the assumed facts, have cast doubt on the validity of the 1966 rates, it is my desire to clarify the status of those rates."

You have now indicated that the Senate's "characterization and interpretation of the figures presented . . . by the Director . . . does not coincide" with your own. You advise me that—prior to your certification of rates on February 3, 1966—the Director of Hospital Costs and Finances had provided you not only with projected and estimated figures for the year 1966 (as stated by the Senate), but also with figures which reflected actual hospital costs and charges. Given the facts as they are stated in your letter, I will answer your questions in the order in which they are posed.

"1. Assuming I was correct in my interpretation that the figures certified to me by the Director within the twelve-month period preceding the February 3 rate certification fulfilled his statutory obligation, and all other statutory conditions had been complied with, was the certification of rates on February 3 valid?"

General Laws c. 7, § 30K contains certain steps which must be completed by the Director of Hospital Costs and Finances before the Commissioner of Administration may lawfully certify the rates called for by that statute.

"The Director of Hospital Costs and Finances shall determine from time to time and certify to the Commissioner of Administration, at least as often as annually, *the average all-inclusive per diem charge to the general public for public ward accommodations or their equivalent, the all-inclusive per diem cost of care in such accommodations and the all-inclusive per diem cost of care for all patients of each hospital, sanatorium and infirmary* licensed by the Department of Public Health under section seventy-one of chapter one hundred eleven." [Emphasis supplied.]

Thus the Director of Hospital Costs and Finances must make available to the Commissioner of Administration three different figures with respect to hospital costs and charges; these figures will ordinarily serve as the basis upon which the Commissioner will establish the eventual rates under the third paragraph of c. 7, § 30K.

I gather from your letter that prior to your establishment of rates on February 3, 1966, the Director of Hospital Costs and Finances provided you with a variety of figures relating to hospital costs and charges. You state that you have treated the Director's communications as certifica-

tions of the costs and charges called for by c. 7, § 30K, and I will not examine this contention. Rather, I will address myself to your questions upon the assumption that proper certification of the sets of figures has been made by the Director.

Assuming that such proper certification has been made, and that—as stated in your request—all other statutory conditions have been complied with, it is clear that the rates promulgated by you on February 3, 1966 have been properly established. My opinion of February 16, 1966 indicated that the rates in question were invalid because the Director had provided estimated figures for the Commissioner's consideration, rather than actual cost and charge averages. If, as you state, the Director did in fact provide the type of concrete, reliable figures contemplated by the statute, the procedural flaw discussed in my earlier opinion does not exist, and—given compliance with the remainder of c. 7, § 30K and with the provisions of c. 30A, the State Administrative Procedure Act—the rates remain fully effective. [I of course do not pass upon the substance of the rates—i.e., the specific dollar amounts set by the Commissioner as standards upon which each hospital or other institution is to be reimbursed. This opinion, as well as the opinion of February 16, 1966, relates only to the procedures followed in establishing the rates at issue.]

“2. Assuming the answer to the first question is in the affirmative, if the Director had properly certified to me figures as therein stated, and had in addition thereto filed with me ‘projected or estimated ward costs and charges for the year commencing January 1, 1966,’ would the furnishing of this additional material invalidate the February 3 rate certification?”

General Laws c. 7, § 30K states a minimum requirement which must be followed by the Director of Hospital Costs and Finances. The Director must certify to the Commissioner of Administration average charges to the general public for public ward accommodations, the all-inclusive cost of care in such accommodations and the all-inclusive cost of care for all patients. Such certification is a condition precedent to valid establishment of rates by the Commissioner.

But I see nothing in the statute which would prohibit the Director from providing additional information if such information happens to be available. Whether such additional information happens to be figures with respect to related subjects, or projections as to future costs and charges, or something else, its existence would not affect rate-setting actions subsequently taken by the Commissioner. At worst, the additional information provided by the Director would be surplusage that could be ignored by the Commissioner. At best, this information might be of sufficient value to warrant its consideration by the Commissioner prior to the final promulgation of rates. The Commissioner need not make any use of the additional information. But if the Director has actually provided the figures called for by c. 7, § 30K, provision by him of additional information does not alter the fact that he has complied with the statutory mandate. Accordingly, I answer your second question in the negative.

"3. If the most recent cost figures that the Director is able to certify to me are costs for a time period substantially earlier than the period for which I must certify rates, am I permitted by said Section 30K to certify rates based on a reasonable projection or estimate of what costs will be for such later period, provided that such projections or estimates are in turn based on the Director's most recent certified cost figures?"

It is a practical fact that the Director of Hospital Costs and Finances cannot possibly hope to provide cost and charge figures which are applicable to the exact day upon which rates are to be promulgated. Our present economy is an inflationary one. In addition, it may well be that certain methods of accounting used by the institutions in question contribute to the inability to arrive exactly at present costs and charges. It cannot be assumed that the Legislature intended the Director to accomplish the impossible. Probably the Director can at best certify costs and charges from a period somewhat earlier than the present. It would be beyond the scope of this opinion to speculate upon how long such a "time-lag" should be. Suffice it to say, it is my opinion that there has been compliance with the statute if the Director of Hospital Costs and Finances makes a reasonable attempt to provide figures which reflect present hospital costs and charges as closely as possible.

I believe that—under c. 7, § 30K—the Commissioner of Administration possesses the authority to take this inevitable "time-lag" into consideration. The General Court has clearly contemplated the making of independent decisions and calculations by the Commissioner; otherwise, the Commissioner could simply "rubber stamp" the figures provided by the Director, and the provision contained in the third paragraph of § 30K to the effect that the Commissioner must make an independent certification of the rates would be unnecessary.

The Commissioner may exercise reasonable discretion in selecting the elements to be considered. These elements may be presented to him at a public hearing, if he chooses to hold one, or they may be called to his attention in other ways. The only requirement is that the considerations which go into the setting of the final rates be reasonable.

It is my opinion that the Commissioner may—in his discretion—take the figures provided by the Director and update them. This may be done by estimating what increases in hospital costs and charges may have taken place during the period between the date of the Director's figures and the present. This in no way conflicts with my opinion rendered to the Senate on February 16, 1966. At that time, I indicated only that the Director of Hospital Costs and Finances could not substitute such projection and estimation for actual concrete figures. I find nothing in the statute which would prevent the Commissioner from employing such projections, assuming that they are reasonable and that they are based upon the figures made available by the Director. Chapter 7, § 30K in fact appears to contemplate such action by the Commissioner, since it vests final authority to establish rates in his office rather than in the office of the Director.

"4. If the most recent audited charge figures that the Director is able to certify to me are charges for a time period substantially earlier than

the period for which I must certify rates, am I permitted by said Section 30K to consider in addition thereto in determining rates reliable information as to actual charges at a later date, even though not certified by the Director?"

My response to your third question covers this inquiry as well. The Commissioner of Administration may lawfully take into consideration any information which may reasonably assist him in the establishment of a proper reimbursement rate. If reliable information relative to more recent hospital costs and charges comes to his attention, it would be unreasonable to insist that it be ignored. However, the Commissioner may act solely upon facts upon which he can reasonably rely. The question arises whether facts and figures so recent that they could not be certified by the Director will meet the criterion of reliability. This however is a determination which must be made by the Commissioner upon all of the facts which are at his disposal.

My responses to the above four questions do not in any way represent a withdrawal or a limitation of my opinion of February 16, 1966. The two opinions are complementary, dealing with two separate factual situations. I make no comment upon which set of facts presented to me—that of the Senate or that of the Commissioner of Administration—may be the more accurate. My opinion of February 16, 1966 is applicable should the facts be as presented by the Senate; the above responses apply to the facts described in the present request.

You have recognized that the presentation to the Department of the Attorney General of different sets of facts, and the subsequent issuance of opinions based on those facts, could potentially result in confusion in the mind of the public. Accordingly, you propose to take steps to resolve the uncertainty as to whether a valid set of rates has been certified for the calendar year 1966. You state:

"Now, in order to allay any uncertainty as to whether the 1966 rates have been properly certified, and because of the overriding necessity of resolving doubts in this vital area, it is my desire to promulgate and again certify rates to the various departments, boards and commissions specified in Section 30K. Because the cost figures certified by the Director subsequent to February 3 are in substance the same as those on which I relied in certifying rates on February 3, and because, upon careful re-examination, I have determined that the rates certified February 3 'reflect reasonable hospital costs or charges made to the general public, whichever is the lower' in accordance with my duty under Section 30K, the rates I desire to certify now would be identical with those certified on February 3. This seems to me to be the prudent course to resolve any remaining doubt as to the validity of the 1966 rates."

In light of the above, your final question is as follows:

"5. Would my certification of identical 1966 rates again at this time conflict with your opinion of August 30, 1965?"

The decision to promulgate rates for 1966 once again is administrative in nature, and I will not comment upon it. I will however—as you

request—indicate whether such action will conflict with my opinion of August 30, 1965.

In that opinion, I stated that the Commissioner of Administration could lawfully promulgate the rates in question only once in a calendar year, and that any additional rates established by the Commissioner would be a nullity. Thus, it is clear that the application of my opinion of August 30, 1965 will depend upon the facts presented. Should the facts described in the Order of the Senate of February 10, 1966 be taken as true, the action taken by you on February 3, 1966 was ineffective; consequently, no rates having lawfully been promulgated for the year 1966, you not only may, but must, set new rates for this year. If, on the other hand, the facts presented in your letter of March 4 are accurate, it would appear that the rates already certified by you were lawfully promulgated. Accordingly, you would not be able to set another rate for the same calendar year. Such new rate would be of no legal effect, and the hospitals and other institutions would be reimbursed on the basis of the rate established by you on February 3, 1966.

In any event, it would appear that your plan to “re-establish” the rates originally promulgated on February 3, 1966 will result in identification of positive legal rates upon which both the institutions involved and the public at large may rely. Since you propose to certify rates which are the same in all respects as those certified earlier in the year, it will be of no legal consequence which statement of facts is determined to be the true one. It will not, as a practical matter, be necessary to decide whether the first or the second set of rates should be applied, since the same figures were included in each certification. Accordingly, it would appear that a re-establishment of 1966 rates at this time would have the legal effect of ensuring that the Commonwealth will have a valid set of rates for the present calendar year.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The words “service in said division of the state police” mean all service, including that as a civilian employee, and consequently this employment must be counted in computing the number of years of service under G. L. c. 32, § 28A.

MARCH 29, 1966.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General*.

DEAR SIR:—In your letter dated March 14, 1966, you request my opinion concerning an interpretation of G. L. c. 32 § 28A. Specifically, you ask whether service as a civilian employee in the Division of State Police can be counted toward the twenty years of service required by § 28A.

General Laws c. 32, § 28A states that:

“Any provision in sections one to twenty-eight, inclusive, to the contrary notwithstanding, any officer of the division of state police in the department of public safety appointed under section nine A of chapter

twenty-two who has performed *service in said division of state police* for not less than twenty years shall, at his own request, be retired by said retirement board. . . .” [Emphasis supplied.]

The above statute does not specify the particular branch or nature of the service that must be performed by an officer in the Division of State Police in order to qualify for retirement benefits. The only requirement appears to be that the officer was appointed under G. L. c. 22, § 9A and that he has at least twenty years of service in the Division. If the Legislature had intended service in a particular branch of the Division of State Police, it could have so specified (see G. L. c. 22, § 9Q, wherein the Legislature specifies service in the uniformed branch of the Division of State Police).

The General Court has not made it clear whether it intended the provisions of this section to apply to officers part of whose time of service had been spent as civilian employees. However, the statute has been drafted in general terms, and I cannot add to it an exception by interpretation. Accordingly, it is my opinion that the words “service in said division of state police” mean all service, including that as a civilian employee, and consequently this employment must be counted in computing the number of years of service under G. L. c. 32, § 28A.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

“Assistance” from the Agricultural Purposes Fund was intended by the Legislature to mean financial assistance in the ordinary meaning of that term, and the mere inspection by the Department of Agriculture does not constitute receipt of such aid within the meaning of G. L. c. 128A, § 3(2).

MARCH 29, 1966.

HON. CHARLES H. McNAMARA, *Commissioner of Agriculture*.

DEAR SIR:—In a recent request for an opinion, you state in essence that the Nantucket Agricultural Society, Inc. (operating a County Fair in Foxboro) has received money from the Agricultural Purposes Fund in each year from 1962 to 1965, inclusive. In 1961 the Society received no money from the Fund but was inspected by a representative of the Department.

The Society has now applied for a racing license pursuant to G. L. c. 128A. The Society is apparently aware of the provision in G. L. c. 128A, § 3 that a license cannot lawfully be issued to a county fair unless “such fair has been operating for each of the five consecutive years immediately preceding the date of filing such application and had received for each of said five consecutive years assistance from the Agricultural Purposes Fund.” The Society claims that the inspection which it received in 1961 constituted such assistance.

I assume that the representatives who inspected the fair in Foxboro are paid out of the Agricultural Purposes Fund, as the Society has

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suggested in a memorandum to you. Nevertheless, I find no basis for the contention that inspection by such representatives constituted "assistance," especially of a financial nature. If inspection were to constitute assistance, every restaurant, theater, apartment building, private school and church, to mention just a few of the types of buildings which are subject to inspection by some officer of government at some stage in their construction or operation, would be receiving "assistance" from the agency of government that made the inspection. Nothing in the statute which is at issue indicates that this unusual conclusion should be reached in this matter.

Accordingly, it is my opinion that "assistance" from the Agricultural Purposes Fund was intended by the Legislature to mean financial assistance in the ordinary meaning of that term, and that the mere inspection by the Department of Agriculture which took place in 1961 does not constitute receipt of such aid within the meaning of G. L. c. 128A, § 3(2).

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Commonwealth, whether acting through the General Court or through a local school committee, cannot constitutionally provide for the devotional reading of the Bible or for the recitation of the Lord's Prayer in the public schools.

Senate Bill No. 734, providing for the opening of each school day with a period of silent meditation, does not conflict with the provisions of the First Amendment to the Constitution of the United States, as those provisions have been applicable to the States through the Fourteenth Amendment.

APRIL 4, 1966.

HIS EXCELLENCY, JOHN A. VOLPE, *Governor of the Commonwealth*.

DEAR GOVERNOR VOLPE:—Your letter of March 31, 1966, informs me that Senate Bill No. 734, entitled AN ACT PROVIDING FOR THE OPENING OF EACH SCHOOL DAY WITH A PERIOD OF SILENT MEDITATION, has been placed before you for approval. The complete text of the Act follows:

"Chapter 71 of the General Laws is hereby amended by inserting after section 1 the following section:—

Section 1A. At the commencement of the first class each day in all grades in all public schools the teacher in charge of the room in which such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in." [Emphasis supplied.]

You have asked me to advise whether enactment of this measure would

violate either the Constitution of the United States or the Constitution of the Commonwealth.

Your question relates primarily to that part of the First Amendment to the Federal Constitution which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." These prohibitions have clearly been made applicable to State governments through the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 13-16; *Cantwell v. State of Connecticut*, 310, U.S. 296, 303-304.

The Massachusetts Constitution contains the equivalent of the Federal Constitution's "freedom of religion" clause, although it does not specifically prohibit an "establishment" of religion.

"... no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."

Constitution of the Commonwealth, Articles of Amendment, Article II.

It is clear that the Federal Constitution has created controls over the operations of government with respect to matters of religion which are at least as severe as those imposed by the Constitution of this Commonwealth. Accordingly, it is necessary to measure the validity of the Act in question solely against the language and meaning of the United States Constitution's First Amendment.

The concept that the State shall not involve itself with matters which are the primary concern of the Church is as old as our system of government itself. "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated." *Zorach v. Clauson*, 343 U.S. 306, 312; See *McGowan v. State of Maryland*, 366 U.S. 420, 441-442.

The United States Supreme Court has recently had further opportunity to emphasize the constitutionally required separation of spiritual and secular governments. In 1963, in the companion cases of *School District of Abington Township v. Schempp* and *Murray v. Curlett*, 374 U.S. 203, the Court ruled that a Pennsylvania statute and a Maryland School Committee rule which required the reading of the Bible each day in the public schools were unconstitutional.

"... In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment." *School District of Abington Township*, *supra*, at page 205.

On August 20, 1963, in an opinion requested by the Commissioner of Education, I indicated that the school prayer decision of the United States Supreme Court applied to the Commonwealth of Massachusetts despite the fact that the Commonwealth had not been a party to the particular legal proceedings.

"As a constitutional ruling under the Fourteenth Amendment, these decisions set forth the supreme law of the land, and are binding on the states and all political subdivisions thereof."

The Supreme Judicial Court of Massachusetts has since confirmed the conclusion which was reached in that opinion. *Attorney General v. School Committee of North Brookfield*, 347 Mass. 775; *Waite v. School Committee of Newton*, 1964 Mass. Adv. Sh. 1259.

Consequently, it can no longer be disputed that the Commonwealth—whether acting through the General Court or through a local school committee—cannot constitutionally provide for the devotional reading of the Bible or for the recitation of the Lord's Prayer in the public schools.

The Act which is presently before you for consideration calls not for a prayer but for "a period of silence not to exceed one minute in duration [to] be observed for meditation. . . ." The term "meditation" is frequently not used synonymously with "prayer." Although the two expressions may upon occasion be used interchangeably, and although some may in their own minds equate one with the other, "meditation" is a word which encompasses many things. It is a word which connotes any of a myriad of forms of reflection, while prayer is simply one form of reflection.

To direct a person of school age to "meditate" will inevitably be to evoke a variety of responses. Some will undoubtedly pray. Others may reflect upon school or home. There will be thoughts of friends, moving pictures, baseball. A few will—at best—simply remain silent.

It cannot be said that the General Court has—by the provisions of Senate Bill No. 734—authorized or directed the practice of a period of prayer in the public schools. I have already indicated—in the opinion addressed to the Commissioner of Education dated August 20, 1963, cited above—that a moment of meditation would not be proscribed.

"It is perfectly clear that a moment of meditation amounts neither to a state endorsement of any form of religion or deity nor state prohibition of any matter of conscience. A principal function of secular education is to encourage students to reflect upon problems of serious moment. A pause during the school day for the purpose of encouraging serious thought is entirely consistent with the functions of the state in education and therefore would be permissible."

The General Court is entitled to the presumption that its statutes are constitutional. An act of the Legislature should not "be treated as void unless it is impossible by reasonable construction to interpret its provisions in harmony with the fundamental law of the Commonwealth." *Commonwealth v. Higgins*, 277 Mass. 191, 193; *Commonwealth v. S. S. Kresge Company*, 267 Mass. 145, 148.

The General Court has called for the practice of a daily "meditation" period in the public schools of the Commonwealth; there is no reason to believe that the Legislature has used the term "meditation" in its narrowest rather than in its broadest sense. The fact that a part of the student body may choose to use the period of silence for purposes of

prayer represents a decision of a personal and independent nature, and does not place the Commonwealth in the position of fostering or supporting a religious exercise.

It is apparent that the General Court was aware of possible constitutional difficulty. The bill which is now designated as Senate Bill No. 734 was originally filed as House Bill No. 1733, and provided in part as follows:

“... Chapter 71 of the General Laws, is hereby amended by inserting after section 1 the following section:—*Section 1A.* The school day in all the public schools of the commonwealth shall commence in silence for one moment so that any pupil who so desires may offer a *prayer* in silence.” [Emphasis supplied.]

In the form in which the Act has been presented to you, silent “prayer” has been replaced by “meditation.” This change is extremely persuasive that the Legislature sought to avoid the attachment of a religious connotation to the period of silence which was being prescribed. It is my opinion that the Legislature has avoided the kind of contact with matters of religion which the First Amendment prohibits, and that—on its face—Senate Bill No. 734 violates none of the provisions of the Federal Constitution.

However, I am compelled to add an important proviso to the aforementioned conclusion of law. The actual administration of this statute on a local basis will be of extreme significance; the attitudes and approaches taken by school committees and especially by individual teachers will be crucial in determining whether this statute is to have an effect consistent with the First Amendment guarantees. The “period of silence . . . for meditation” must not be simply a camouflage for a school prayer. Educators upon all levels who may be concerned with the administration of this legislative directive must maintain at all times a strict neutrality and indifference to the subject upon which the individual student may choose to reflect.

If enacted, Senate Bill No. 734 must not be implemented so as to provide merely an opportunity for disguised school prayer. The constitutionality of this statute depends upon the presumption that its passage does not represent a desire to evade the United States Supreme Court decision of 1963.

“... so far as interference with the ‘free exercise’ of religion and an ‘establishment’ of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. . . .”

Zorach v. Clauson, supra, at page 312.

If the effect of an Act of the Legislature is to advance or inhibit a specific religion or religion in general in any way, “then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.”

School District of Abington Township, supra, at page 222.

Accordingly, based upon the principles and reasoning which I have discussed above, it is my opinion that Senate Bill No. 734 does not

conflict with the provisions of the First Amendment to the Constitution of the United States, as those provisions have been made applicable to the States through the Fourteenth Amendment.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

A town may not unilaterally withdraw from a superintendency union. In the event a member town in a union joins with other towns to form a region, the status of the towns, and of the superintendent appointed by the participating school committees, would remain the same.

The vote of all of the towns in a union to form a regional district does not, even in a situation where dual membership would not be possible, automatically dissolve the superintendency union.

APRIL 11, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—You have asked the following questions with regard to the dissolution of a superintendency union:

“(1) If a town is a member of a union and wishes to join in a kindergarten through twelve regional school district, involving different towns, is it necessary that the above provision contained in Chapter 71, Section 61 of the General Laws be observed, or does a vote by all the towns to form the region automatically dissolve the union?”

“(2) If a member town in a union may join with other towns to form a region and there are four towns in the union, what would be the status of the superintendent who enjoys tenure in the union?”

With regard to your first question, the law of this Commonwealth regulating superintendency unions is contained in G. L. c. 71, § 61. That section provides as follows:

“The school committees of two or more towns, each having a valuation less than two million five hundred thousand dollars, and having an aggregate maximum of seventy-five, and an aggregate minimum of twenty-five, schools, and the committees of four or more such towns, having said maximum but irrespective of said minimum, shall form a union for employing a superintendent of schools. A town whose valuation exceeds said amount, may participate in such a union but otherwise subject to this section. *Such a union shall not be dissolved except by vote of the school committees representing a majority of the participating towns with the consent of the department, nor by reason of any change in valuation or the number of schools.*” [Emphasis supplied.]

Under the language of this section, it is clear that there is a particular, exclusive procedure for dissolution of a superintendency union. There is no basis in the express, concise wording of § 61 for asserting the existence of any alternatives to the procedures designated therein. Consequently,

to dissolve such a union, there must be a vote to dissolve taken by the school committees representing a majority of the participating towns and, in addition, the consent of the Department of Education. Dissolution is, therefore, a two-step process and cannot be accomplished solely by the unilateral action of a town or group of towns.

It is my opinion that the vote of a town to participate in a regional school district does not automatically dissolve its membership in a prior existing superintendency union. First, as indicated above, it is not possible for a town or group of towns to withdraw from a union other than by dissolution of that union voted by the majority of its members and with the consent of the Department of Education. Secondly, it is common for a town or towns simultaneously to belong to both a superintendency union and a regional school district. Certain towns belong to a superintendency union for the first eight grades and a regional school district for grades nine through twelve. Under these circumstances, there being no inconsistency in dual membership, a vote under c. 71, § 15 to join a regional school district would have no effect upon a prior membership in a superintendency union. Consequently, membership in a regional school district, subsequent and supplementary to membership in the superintendency union, would not automatically dissolve that earlier affiliation with the said superintendency union.

Your request raises the specific problem whether a vote under c. 71, § 15 to form a regional school district for *all* grade levels and, therefore, not in supplement of but in substitution for the superintendency union, automatically supersedes the requirement to vote dissolution under § 61 of the superintendency union governing those same grades.

It is my opinion that the vote of all of the towns in a union to form a regional district does not, even in the situation where dual membership would not be possible, automatically dissolve the superintendency union. Although such a vote may well indicate the desire of the members to dissolve the union, it does not comply with the strict statutory standards developed by the Legislature. Had the General Court intended that a vote to form a regional school district could be a satisfactory substitute for the ordinary requirements relating to dissolution of a superintendency union, it presumably would have so provided. In the absence of express language in either § 61 or §§ 14 through 16I, the vote to form a regional district cannot by implication be considered as a vote to dissolve a prior existing superintendency union.

Furthermore, nothing appears in the relevant statutory provisions which would relieve the members of the requirement of securing the consent of the Department of Education.

It follows—in response to your second question—that a town may not unilaterally withdraw from a superintendency union. Accordingly, on the facts which you state, the status of the towns in question, and of the superintendent appointed by the participating school committees, would remain the same.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

If a constituent municipality (of a regional planning district) refuses to pay its lawful share of the district expenses upon order of the District Commission, a writ of mandamus lies against the municipality and the treasurer to compel such payment.

There is no statutory provision for the dissolution of regional planning districts after they are formed pursuant to G. L. c. 40B, § 3.

The voting rights of a member of a regional district commission cannot, in absence of express statutory authority, be suspended by the commission because the member's municipality has not paid its share of expenses.

APRIL 11, 1966.

HON. THEODORE W. SCHULENBERG, *Commissioner, Department of Commerce and Development.*

DEAR SIR:—You have requested my opinion on the following questions concerning the operation of G. L. c. 40B, which provides for the establishment and operation of regional planning districts:

“(1) A community having voted to become a member of a planning district, what statutory provision of Chapter 40B, as amended, required that the community pays to the district treasurer that sum certified by the Commission as the community's proportion of the costs and expenses of the District?

“(2) A community having properly voted to become a member of a Chapter 40B District, what method or methods of withdrawal, disassociation, or resignation from the District are available to that community?

“(3) The District Commission having certified a member municipality's share of the costs and expenses of the District, for the current year, what means are available to the District for the collection of this assessment from a community which has failed to pay current or previous assessments, to the district treasurer?

“(4) Can the Planning District Commission suspend the voting rights of a member community or communities which have not paid those sums certified by the District Commission as the share or shares of the costs and expenses of the District?”

I shall consider questions (1) and (3) together. I assume that in question (1) “required” is a typographical error for “requires.” The requirement that each member municipality of a regional planning district pay its share of the expenses of the district is found in G. L. c. 40B, § 7, which states (in part):

“Said commission shall, annually in the month of December, estimate the amount of money required to pay the costs and expenses of the district for the following year, shall fix and determine the proportion of such costs and expenses to be paid by the constituent cities and towns thereof during such year which, however, may not exceed any limit or maximum amount fixed by the city council of any city or town meeting of any town which votes to become a member of such planning district and shall certify the amount so determined for each city and town to the

assessors thereof who shall include the sum in the tax levy of each year. Such apportioned cost shall be on a per capita basis in direct proportion to the population of the city or town and the planning district as they appear in the most recent national census, exclusive of the population in county, state or federal institutions. *Upon order of the commission, the treasurer of each constituent municipality thereof shall, from time to time, subject to the provisions of section fifty-two of chapter forty-one of the General Laws, pay to the district treasurer sums not exceeding the amount certified by the commission as the municipality's share of the costs and expenses of the district. . .*" [Emphasis supplied.]

If a constituent municipality refuses to pay its lawful share of the district expenses upon order of the Commission, I am of the opinion that a writ of mandamus lies against the municipality and the treasurer to compel such payment. *Taylor County Farm Bureau v. Board of Supervisors of Taylor County*, 218 Iowa 937, 939-942. *Calhoun v. Maricopa County Mun. Water Cons. Dist. No. 1*, 37 Ariz. 506, 509. *State ex rel. Smith v. Highway Commn. of Kansas*, 132 Kan. 327, 335. *County Bd. of Education of Boyle County v. Caldwell*, 248 Ky. 571. *Board of Education of Oklahoma City v. Excise Bd. of Oklahoma*, 175 Okla. 363, 365-366. See *Department of Public Welfare v. Billerica*, 1966 Mass. Adv. Sh. 9, 10-11 (establishing the principle that mandamus is available to compel a municipality to disburse money in obedience to its statutory duties.) Cf. G. L. c. 71, §§ 16B and 34 (expressly authorizing bill in equity to compel member municipality of regional school district to pay proper share of district expenses); *Regional Dist. School Commn. of the Bridgewater-Raynham Regional School Dist. v. Bridgewater*, 347 Mass. 289.

It appears, in response to your second question, that there is no statutory provision for the dissolution of regional planning districts after they are formed pursuant to G. L. c. 40B, § 3. Although there do not appear to be any Massachusetts cases in point, it has been held in analogous cases in other jurisdictions that the constituent municipalities of a regional district do not have "the power to withdraw therefrom without legislative authority." *Regional High School Dist. No. 3 v. Newtown*, 134 Conn. 613, 620-621. *Knapp v. Swift River Valley Community School Dist.*, 152 Me. 350, 354. I conclude that the only "method . . . of withdrawal, disassociation, or resignation from [a regional planning] district" is by legislative action. See *Kingman, petitioner*, 153 Mass. 566, 573; cf. *Weymouth & Braintree Fire Dist. v. County Commrs. of Norfolk*, 100 Mass. 142 (Legislature could authorize means of withdrawal from fire district by member town).

It is not clear from your fourth question whether the "voting rights of a member community" refers to the right of a designated commissioner from any particular member community to vote at meetings of the commission, or to the rights of member communities to designate such commissioners. I assume, however, that the former interpretation is intended.

The procedure for selecting the members of a regional planning commission is set forth in G. L. c. 40B, § 4, which states:

"In each planning district so established there shall be a district

planning commission consisting of one member of the planning board of each city and town voting to join such district, elected annually by said planning board. There may be a designee, who may or may not be a planning board member, appointed annually by the mayor in a city, confirmed by the council, or by the selectmen in a town, who may attend meetings of the district planning commission, and who shall assume the rights and duties of the planning board member in his absence. In a member town which has not established a planning board, the selectmen shall annually appoint a member of the district planning commission. Such district planning commission shall annually elect a chairman, a treasurer who shall give the commission a bond, with a surety company authorized to transact business in the commonwealth as surety, for the faithful performance of his duties in such sums and upon such conditions as the commission may require, and a clerk from among its members. The said commission may employ experts and clerical and other assistants. All meetings of the commission shall be held at the call of the chairman and at such other times as the commission may determine."

It has been held generally that officers of a body, politic and corporate, even when such a body exercises authority wholly within a given town or city, are officers of the particular body and not of the municipality. *Morse v. Ashley*, 193 Mass. 294, 296. *Sweeney v. Boston*, 309 Mass. 106, 108-110. *Worburton v. Quincy*, 309 Mass. 111, 117. I consider it an *a fortiori* proposition that officers of regional bodies politic and corporate, such as a regional planning district (see G. L. c. 40B, § 3), which is composed of several municipalities, are officers of these bodies and not of the municipalities from which they are designated. See *Goodale v. Commissioners of Worcester County*, 277 Mass. 144, 152 ("County commissioners are county officers.") This is true even in cases such as the present where the officers in question are elected from and presumably "represent" the individual municipalities that comprise the region. *Myers v. Post*, 256 Mich. 156, 158-159.

In this Commonwealth there is no authority for removal of any officers of towns and cities except that which is given by statute. *Attorney General v. Stratton*, 194 Mass. 51, 53-54. Considering the reasoning of the opinion in that case, I would assume that the decision applies to regional bodies as well. What the Court, quoting the earlier case of *Stetson v. Kempton*, 13 Mass. 272, 278, said of cities and towns is, at least equally, true of regional planning districts (p. 53): "Their corporate powers depend upon legislative charter or grant. . . ." See *Williams v. City Manager of Haverhill*, 330 Mass. 14, 15. I do not think it material that your question concerns suspension of voting rights rather than outright removal. "Members of the governing board of a municipal corporation are entitled to vote therein." 62 C.J.S. 760. I assume that this statement is equally applicable to the governing boards of regional districts. I conclude that the voting rights of a member of a regional district commission cannot, in absence of express statutory authority, be suspended by the commission because that member's municipality has not paid its share of expenses.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Board of Library Commissioners may not enter into any contract to pay a Regional Reference and Research Center for its services where such payment is unrelated to expenditures.

The Board may enter into an agreement with the trustees of the Boston Public Library pursuant to which the Boston Public Library will carry out the purposes of paragraph (1) of § 19C of c. 78 M.G.L., providing the books and services mentioned therein to several municipalities in Eastern Massachusetts.

APRIL 13, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—You have asked several questions relating to the interpretation of G. L. c. 78, § 19C. I quote the statute in full:

“The board shall establish a comprehensive state-wide program of regional public library service, consisting of regional public library systems, which shall not exceed five. For such purpose there shall be appropriated annually an amount equal to twenty-five cents for each resident in each regional area for which such a regional library system is established. The board shall apply said appropriation in the following manner:—

“(1) In so far as practicable the board shall enter into an arrangement or arrangements with such public library or libraries in each regional area as it may determine under the terms of which such library or libraries shall supply services or space, equipment, personnel, books, periodicals and other library materials to communities having fewer than twenty-five thousand inhabitants, the cost of which shall not exceed an amount equal to fifty cents per annum for each resident in such regional community having less than twenty-five thousand inhabitants;

“(2) Said board shall also designate such public library or libraries in each area or an additional such public library or libraries in the area to serve as a regional reference and research center or centers to meet the reference and research library needs of the residents of all the cities and towns in the area; the amount allocated for such reference and research service to be applied only to the cost of such reference and research books, periodicals and other library materials and to the cost of the personnel employed in such reference and research service; the cost of such reference and research service not to exceed an amount equal to twenty-five cents per annum for each resident in such regional area.”

In essence you ask two questions, which I paraphrase from your letter:

1. Does the above statute permit the Board of Library Commissioners (referred to as the Board in § 19C) and the Trustees of the Boston Public Library to enter into a contract pursuant to which the Boston Public Library, serving as a reference and research center as defined in paragraph (2) of § 19C, will receive for its services monthly payments “unrelated to [actual] expenditures”?

2. May the Board, acting on behalf of the Commonwealth and the Trustees of the Boston Public Library, enter into an agreement pursuant to which the Boston Public Library will carry out the purposes of paragraph (1) of § 19C by providing the books and services mentioned therein to several towns and cities in Eastern Massachusetts? (Under the proposed agreement, the Boston Public Library would also provide personnel, books, and audio-visual and other library materials to public libraries in Andover, Falmouth, Taunton and Wellesley. Personnel and material so provided would then be available "to individuals resident in" the towns and cities to which the Boston Public Library will also supply services directly. The Boston Public Library will be supervised in the performance of this agreement by the Board and will receive monthly reimbursement for these services.)

I assume, for purposes of this opinion, that the trustees of the Boston Public Library are empowered to enter into the proposed agreement. I note also that the Board is generally competent to "contract with any . . . city or town, public or private library to provide improved library services in an area, or to secure such library services as may be agreed upon." G. L. c. 78, § 19. These premises are applicable to both questions, which I now proceed to consider separately.

The Board may not enter into any contract to pay a regional reference and research center for its services where such payment is, as you state in your letter, "unrelated to expenditures." Money expended by the Board for such centers, pursuant to § 19, para. 2, may be "applied *only* to the cost of . . . reference and research books, periodicals and other library materials [maintained in the centers] and to the cost of personnel employed in . . . reference and research service." [Emphasis supplied.] The word "cost" (see *Newton, petitioner* 172 Mass. 5) in the sense in which it is used in the statute seems to contemplate "only disbursements reasonably made and actually required." *Ahmed's Case*, 278 Mass. 180, 185. To permit the Board to enter into the type of contract mentioned in question 1 would be to turn the research and reference center in Boston into a profit-making (or losing) operation for the Trustees. Clearly, this type of expenditure is beyond the authority given to the Board in G. L. c. 78, § 19C, para. 2 to establish such centers. See *Gould v. Mount Greylock Commn.*, 1966 Mass. Adv. Sh. 431.

The Board's power under G. L. c. 78, § 19C, para. 1 to enter into "an arrangement or arrangements with such public library or libraries" to supply personnel and materials to communities with fewer than 25,000 people is restricted only in the amount that the Board may spend to obtain such items. The restriction is that the Board may spend no more than fifty cents per year for each resident of each community to be supplied. Furthermore, G. L. c. 78, § 19 (as already noted) authorizes the Board to "contract with any other state agency, city or town, public or private library to provide improved library services in an area, or to secure such library services as may be agreed upon."

I have no reason to assume that the Board's proposed contract with the Trustees of the Boston Public Library is not a satisfactory "arrangement" under G. L. c. 78, § 19C, para. 1 for the carrying out of the Board's duties under that paragraph. I assume that under this agreement

the Board will observe the requirement that the expenditure for any one community not exceed fifty cents annually for each resident thereof. As long as the requirements of the statute are observed, the Board would appear to have broad power to cooperate with public agencies and private organizations to realize the purposes of the statute. See *Massachusetts Bay Transportation Authority v. Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 542-543.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The Director of the Division of Personnel and Standardization may not act under G. L. c. 30, § 46, paragraph 5A, to approve the recruitment at a rate above the minimum of the grade, of any person who has been "in the service of the Commonwealth" within a year of such recruitment.

APRIL 14, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—In a recent request for an opinion you state:

"On July 27, 1965, in accordance with directive of Leonard A. Kelley, Director of Personnel and Standardization dated May 13, 1964, this Department processed a recruitment letter dated July 27, 1965, to appoint Lawrence W. Latour as a Supervisor in Education. As a result thereof permission was granted to recruit Mr. Latour at Grade 15-F, Step 5, at a salary of \$169.20 per week.

"Recently, we have been advised that Mr. Latour was employed as a Lifeguard in the Department of Natural Resources for the period May 29, 1965 to June 15, 1965 therefore our statement that Mr. Latour had not been in the service of the Commonwealth during the preceding twelve month period was in error."

Paragraph 5A of G. L. c. 30, § 46 states (in part):

"The said director [of personnel and standardization] shall permit the recruitment of professional personnel at a rate above the minimum and within the grade to which the requested position is allocated upon certification of the appointing authority that the person to be employed has served satisfactorily in a comparable position for a period of time equivalent to the period required by the general salary schedule had such service been entirely in the service of the commonwealth. For the purposes of this paragraph, professional personnel shall include, but shall not be limited to, registered nurses and persons employed in medical or technical positions in hospitals and clinics, including the administration thereof, persons employed for the instruction of students, and engineers and chemists. . . ."

Presumably acting pursuant to this statute, the Board on June 30, 1965, voted to appoint Mr. Latour at an annual salary of \$8,798.40.

Since this salary was in excess of the minimum for this position, on July 27, 1965, you requested the Director of Personnel and Standardization to approve this salary. In view of Mr. Latour's employment by the Department of Natural Resources from May 24, 1965 to June 15, 1965, the question arises as to whether such approval violates the provisions of St. 1964, c. 337, § 6A, which declares:

"Notwithstanding the provisions of paragraph (5A) of section forty-six of chapter thirty of the General Laws, the director of personnel and standardization shall not approve the recruitment of any person at a rate above the minimum of the grade if such proposed employee has been in the service of the commonwealth within a twelve-month period prior to the date of the proposed recruitment."

This broad language is unambiguous. The director may not act under G. L. c. 30, § 46, paragraph 5A, to approve the recruitment at a rate above the minimum of the grade, of any person who has been "in the service of the commonwealth" within a year of such recruitment. Clearly, when Mr. Latour served as a lifeguard for the Department of Natural Resources, up to within two weeks of the date of his appointment, he was "in the service of the commonwealth"; that is, he was involved in a master-servant relationship with the Commonwealth. *Humphrey's Case*, 227 Mass. 166, 167. *Cameron v. State Theatre Co.*, 256 Mass. 466, 467, and cases cited. *Warren's Case*, 326 Mass. 718, 719. It does not appear from your letter whether Mr. Latour informed the Department of Natural Resources, when he was employed as a lifeguard, that he was simultaneously seeking employment with the Department of Education. Whether or not he did so, it may well have been a purpose of St. 1964, c. 337, § 6A to discourage a person seeking employment with one agency of the Commonwealth from accepting employment with another such agency and then leaving when he obtains the job that he prefers. If this is the purpose of the statute, approval of Mr. Latour's recruitment at the higher rate would contravene not only the language of the statute but also its intention. In any event, the meaning of the words of the statute is clear, and conjecture as to its purpose is unnecessary. *Corcoran v. S. S. Kresge Co.*, 313 Mass. 299, 303, and cases cited. I conclude that approval of Mr. Latour's recruitment at a rate above the minimum of the grade would be improper.

I have considered the possibility that St. 1964, c. 337, § 6A was not in force at the date of Mr. Latour's recruitment. If the date of recruitment was June 30, 1965, the date on which Mr. Latour was appointed, the applicability of the statute under § 1 thereof is not subject to question. But even if July 27, 1965, the date of the letter to the director requesting the recruitment at a rate above the minimum, be considered the date of recruitment, the statute would probably be in force. "All acts of legislation not in terms limited in their operation to a particular term of time, are in legal contemplation perpetual or declared to be in force *forever*; which means until duly altered or changed by competent authority." *Wellington, petitioner*, 16 Pick. 87, 102. Despite the statement in St. 1964, c. 337, § 1 that the funds appropriated by the act are "for the fiscal year ending June thirtieth, nineteen hundred and sixty-five," the operation of

§ 6A does not seem to be "limited . . . to a particular term of time." In any event, the Legislature apparently still favors the policy embodied in St. 1964, c. 337, § 6A, para. 1, for it enacted exactly the same language in St. 1965, c. 824, § 6A. My conclusion as to the impropriety of recruiting Mr. Latour at a grade above the minimum applies regardless of the date of his recruitment.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The word "law" used in Article 48, P. 43, § 1, of the Amendments to the Constitution refers to a specific Act of the Legislature, and not merely to one or more sections of an Act. The three referendum petitions which relate to individual sections of c. 14 of the Acts of 1966 do not conform with the requirements of Articles 48 and 74 of the Constitution of the Commonwealth, and the questions contained therein may not properly appear on the November ballot.

Chapter 14 of the Acts of 1966 in no way appropriates money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions or institutions, and would not be excluded from the referendum for that reason.

The referendum petition which relates to c. 14 of the Acts of 1966 as a whole refers to matters which are proper subjects for the referendum under the provisions of the Constitution of the Commonwealth, and such referendum petition may lawfully appear on the ballot at the biennial state election in November, 1966.

APRIL 14, 1966.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR MR. WHITE:—By letters of March 28 and March 31, 1966, you indicate that four referendum petitions have been presented to you pursuant to the provisions of Articles 48 and 74 of the Amendments to the Constitution of Massachusetts. In accordance with §§ 3 and 4 of Article 74 of the Amendments, your Office is required to print upon petitions to be circulated for the collection of signatures, and subsequently upon the ballot, a fair and concise summary (drawn by the Attorney General) of the measure upon which the vote is to be taken. You have requested my opinion as to whether the legislative provisions which are the subject of the several petitions are matters which may be made subject to the referendum.

Each of the referendum petitions in question relates to c. 14 of the Acts of 1966, entitled "AN ACT IMPOSING A TEMPORARY TAX ON RETAIL SALES, AND A TEMPORARY EXCISE UPON THE STORAGE, USE OR OTHER CONSUMPTION, OF CERTAIN TANGIBLE PERSONAL PROPERTY, REVISING AND IMPOSING CERTAIN OTHER TAXES AND EXCISES, ESTABLISHING THE LOCAL AID FUND, AND PROVIDING FOR THE DISTRIBUTION OF FUNDS THEREFROM TO CITIES AND TOWNS." The first

petition relates solely to subsection 2 of § 1 of said c. 14, which subsection provides:

“An excise is hereby imposed upon sales at retail of tangible personal property in this commonwealth by any vendor at the rate of three per cent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this section.”

The second petition relates to all of § 1 of c. 14, which section includes all of the provisions relating to the establishment, imposition and administration of the limited sales tax. The third petition relates to §§ 1 through 4, inclusive, of c. 14, which sections provide for the sales tax and a use tax, and for certain exemptions therefrom. The fourth petition relates to all of c. 14 of the Acts of 1966.

It must first be resolved whether a section of a given Act of the Legislature may by itself be the subject of a referendum petition apart from the remainder of the Act. Article 48 of the Amendments to the Massachusetts Constitution provides, in *Ref.*, Pt. 3, § 1:

“A referendum petition may ask for a referendum to the people *upon any law enacted by the general court* which is not herein expressly excluded.” [Emphasis supplied.]

The Supreme Judicial Court has never attempted to frame a precise definition of the word “law.” It has indicated only that the word “imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject.” *Opinion of the Justices*, 262 Mass. 603, 605.

It is my opinion that the word “law,” as it is used in that part of Article 48 of the Amendments which is quoted above, refers to a specific Act of the Legislature, and not merely to one or more sections of an Act. A similar conclusion has been reached by a former Attorney General:

“The word ‘law’ as used in the amendment connotes an act of the Legislature, approved by the Governor, regarded as an entity. The word has no application to a single part or section of such an act taken by itself. That the word is to be so construed is made clear by an examination of the proceedings of the Constitutional Convention, by which the initiative and referendum provisions were framed. It follows that a particular section of an act may not of itself be the subject of a referendum.”

VIII Op. Atty. Gen., p. 331, 333-334.

It is the purpose of the referendum provisions of the Massachusetts Constitution to enable the people to pass upon action taken by the Legislature. In the present case, the General Court has chosen to enact c. 14 of the Acts of 1966 as a whole. If certain petitioners desire to have such legislative action reviewed at the polls, they must place before the people the matters in question in the form in which they were passed by the General Court and approved by the Governor. No rights are lost by thus limiting the referendum. If a single section of c. 14 is of primary concern to a given group of petitioners, it may be amended or repealed by means of the initiative petition.

Accordingly, it is my opinion that the three referendum petitions which relate to individual sections of c. 14 of the Acts of 1966 do not conform with the requirements of Articles 48 and 74 of the Constitution of the Commonwealth, and that the questions contained therein may not properly appear on the November ballot. It remains, therefore, to consider whether the referendum petition which relates to c. 14 as a whole is a proper petition under the relevant constitutional provisions. This requires an analysis of § 2 of Pt. 3 of Article 48 of the Amendments, *The Referendum*, relating to excluded matters.

This section of the Constitution provides as follows:

“No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.” [Emphasis supplied.]

Article 48 of the Amendments is a relatively detailed part of the Constitution, and its provisions are mandatory. *Opinion of the Justices*, 294 Mass. 610, 614.

Accordingly, if c. 14 of the Acts of 1966 in any way appropriates money for the current or ordinary expenses of the Commonwealth, or for any of the Commonwealth's departments, boards, commissions or institutions, it may not lawfully be the subject of a referendum petition. The General Court need not specifically use the word “appropriate” in order for a particular act to be considered an appropriation measure. Any action of the Legislature which directs the use to which a particular sum of money is to be put, and which restricts the funds in question to that use, must be considered an appropriation. *Opinion of the Justices*, 297 Mass. 577, 580. If the Legislature has directed the distribution of money, and no further appropriation act is necessary, the Act which directs such distribution is itself an “appropriation” in the constitutional sense.

Opinion of the Justices, 300 Mass. 630, 636

Cf. Opinion of the Justices, 309 Mass. 571, 583

It cannot be disputed that a tax measure is subject to the referendum. The raising of taxes by itself represents only an accumulation of funds, and does not specifically indicate to what use such funds are to be put. Earmarking money for specific purposes may or may not be an appropriation. Section 23 of c. 14 of the Acts of 1966 indicates that a certain portion of the excises collected under § 6 of the Chapter are to be paid into the General Fund. Such payment into the General Fund cannot be considered an appropriation. Likewise, § 25 of the Act directs that two-thirds of all sums received under c. 64G of the General Laws shall be credited to the General Fund, and one-third of all such sums shall be credited to the Tourism and Industrial Promotion Fund. This latter fund shall be used, subject to appropriation, for the development and promo-

tion of tourism in the Commonwealth. Since a further act of appropriation is necessary in order to authorize the payment of money out of the fund, the legislation which directs the placement of money in the fund cannot itself be considered an appropriation.

However, c. 14 of the Acts of 1966 does contain certain provisions which—in my opinion—are appropriations. Section 28 of the Act creates the Local Aid Fund for the purpose of assisting the cities and towns of the Commonwealth in accordance with the state-aid-for-education provisions of §§ 18 and 18A of c. 58 of the General Laws. Section 29 of c. 14 rewrites § 18 of c. 58 to provide for the crediting of certain amounts to the Local Aid Fund. And § 30 of c. 14 rewrites § 18A of c. 58 to provide for an annual distribution from the Local Aid Fund to all of the municipalities of the Commonwealth.

Accordingly, §§ 28, 29 and 30 of c. 14 provide for the specific use of certain amounts paid into the so-called Local Aid Fund. Such amounts will automatically be distributed by the Treasurer to the cities and towns pursuant to the provisions of c. 58, § 18A without the necessity of further action by the General Court. The Legislature has thus directed the usage of a particular sum of money, which sum can no longer be used for any other purpose. Such action by the Legislature must be considered to be an appropriation.

However, identification of an appropriation in certain sections of c. 14 of the Acts of 1966 does not of necessity mean that the subject matter of the said c. 14 is excluded from the referendum. The Constitution of the Commonwealth provides, as quoted above, that no law which “appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions” shall be the subject of a referendum petition. The Constitution does not exclude all appropriations; rather, it excludes only those appropriations made for the ordinary expenses of the Commonwealth, and for the Commonwealth’s various departments and agencies.

Chapter 14 of the Acts of 1966 does not contain a single appropriation for the Commonwealth or for its agencies. Receipts from the various taxes which have been imposed are either paid directly into the General Fund, or allotted in accordance with a formula to the cities and towns. Those sections which can be said to contain appropriations direct the payment of funds to municipalities only, and cannot in any sense be said to contain appropriations for the Commonwealth. Accordingly, it is my opinion that c. 14 of the Acts of 1966 in no way appropriates money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions or institutions, and would not be excluded from the referendum for that reason.

Nor do I find that the operation of this Act “is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth.” Restrictions to a particular subdivision, district or locality must be specified in the law in question in terms which are geographically descriptive of a particular limited area in order for such a law to be an excluded matter.

Town of Mount Washington v. Cook, 288 Mass. 67, 74

Cf. Opinion of the Justices, 261 Mass. 523, 554

The Act in question does not relate to a specific district or subdivision in a way which would exclude it from the referendum. The funds which are to be distributed pursuant to c. 14 are not limited to particular municipalities, but will be paid to each of the 351 cities and towns in the Commonwealth. It is clear that c. 14 is not a law which is restricted in the sense of § 2 of Pt. 3, Article 48 of the Amendments, *The Referendum*.

Accordingly, in light of the above, I advise you that the referendum petition which relates to c. 14 of the Acts of 1966 as a whole refers to matters which are proper subjects for the referendum under the provisions of the Constitution of the Commonwealth, and that such referendum petition may lawfully appear on the ballot at the biennial State election to be held in November, 1966.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Fair and concise summary of the provisions of c. 14 of the Acts of 1966, which has been made the subject of a referendum petition.

APRIL 15, 1966.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR MR. WHITE:—In accordance with Articles 48 and 74 of the Amendments to the Constitution of Massachusetts, I have prepared a "fair and concise summary" of the provisions of c. 14 of the Acts of 1966, entitled "AN ACT IMPOSING A TEMPORARY TAX ON RETAIL SALES, AND A TEMPORARY EXCISE UPON THE STORAGE, USE OR OTHER CONSUMPTION, OF CERTAIN TANGIBLE PERSONAL PROPERTY, REVISING AND IMPOSING CERTAIN OTHER TAXES AND EXCISES, ESTABLISHING THE LOCAL AID FUND, AND PROVIDING FOR THE DISTRIBUTION OF FUNDS THEREFROM TO CITIES AND TOWNS." This Chapter has been made the subject of a referendum petition filed in your office by ten qualified voters, and the following summary must appear on the signature sheets to be distributed by the petitioners.

SUMMARY

The Act imposes a temporary tax upon all retail sales of tangible personal property at the rate of three per cent of the selling price. Sales of certain items are exempted from the tax, including but not limited to sales of food products for human use, articles of clothing, prescription medicines, agricultural machinery and certain publications. The statute contains specific provisions relating to the registration of vendors, the filing of returns and the payment of the amounts collected by such vendors. Vendors may apply to the State Tax Commission for abatements of the amounts owed where they believe such amounts to be excessive, and decisions of the Commission on such applications may be reviewed by the Appellate Tax Board. The Commissioner of Corporations and Taxation shall have the usual powers and remedies provided

for tax collection for the collection of the taxes imposed by this section. The State Tax Commission shall issue regulations necessary for proper administration and enforcement of the section.

The Act further imposes a temporary excise upon the storage, use or other consumption in Massachusetts of tangible personal property at the rate of three per cent of the sales price of such property. Sales upon which the retail sales tax described above has been imposed, or which are exempt from the retail sales tax, shall be exempt from the use tax. Sales upon which a tax has been paid in another jurisdiction shall also be exempt. Assessment, abatement and collection of the use tax shall be governed by the provisions which relate to the tax upon retail sales. The tax upon retail sales and the excise upon storage, use or other consumption shall be effective during the period from April 1, 1966 to December 31, 1967.

Each qualified taxpayer shall be entitled to a credit of four dollars for himself, four dollars for his spouse and eight dollars for each qualified dependent, but such credit shall not be allowed if the taxable income of such individual and his spouse exceeds five thousand dollars for the year. In addition to the taxes described above, the Act provides for new excises upon certain banks; new taxes upon the income of certain corporations; new taxes upon cigarettes; a room occupancy excise upon rent paid for the use of hotel rooms and other lodging places; and excises upon sales of certain alcoholic beverages.

The Act creates the Local Aid Fund for the purpose of providing educational assistance, and authorizes the periodic distribution of amounts from such Fund to the cities and towns. In addition, the Act contains a variety of provisions relating to the program of State aid to public schools, and to its administration.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A regulation prohibiting beauty shops from being established in an enclosed room entirely within another unrelated place of business is not within the ambit of the enabling legislation, and adoption of such a rule or regulation is not authorized by the Legislature.

APRIL 18, 1966.

MRS. IRENE E. BODE, *Chairman, Board of Registration of Hairdressers*.

DEAR MRS. BODE:—In a recent request for an opinion you call my attention to the following proposed regulation of the Board of Registration of Hairdressers:

“No shop shall be conducted or maintained in any room or enclosure in which any other business, trade, occupation or activity is carried on except so far as may be permitted by the provisions of Section 87CC of Chapter 112 of the General Laws and other applicable provisions of law.”

You then ask:

"In view of General Laws, Ch. 112, Sec. 87CC is the promulgation or enforcement of the above rule authorized by the Legislature with respect to:

"a. A beauty shop carried on within the same room or enclosure as another unrelated business;

"b. A beauty shop carried on within a separate room or enclosure which is enclosed entirely within another unrelated place of business."

Section 87CC of G. L. c. 112 states (in part):

"The board shall make such uniform and reasonable rules and regulations as are necessary for the proper conduct of its business, the establishment of proper standards of professional skill in relation to, and the proper supervision of, hairdressers, demonstrators, manicurists, operators, beauty shops, manicure shops, schools, students and instructors, and especially may prescribe such sanitary rules, subject to the approval of the department of public health, as it may deem necessary to prevent the spreading of infection or contagious diseases, or both, but nothing herein shall authorize the board to limit the number of hairdressers, demonstrators, manicurists, beauty shops, manicure shops, schools, operators, students or instructors in the commonwealth or in any given locality, or to regulate or fix compensation or prices, or to refuse to register a shop solely for the reason that such shop is to be conducted by a person in his own home on a full or part time basis. The board shall not make any rule or regulation restraining the normal and incidental business of hairdressers' shops or similar establishments by restricting in any way the sale at retail in such places of so-called beauty preparations, lotions, salves, toilet articles, jewelry and gift novelties."

It is a well-settled principle of law that administrative regulations must be "within the ambit of the enabling statute [in this case, § 87CC]." *Commonwealth v. Diaz*, 326 Mass. 525, 527-528 and cases cited. Furthermore, under the Constitution of this Commonwealth neither the Legislature nor an administrative body can impose an "arbitrary interference with business or irrational or unnecessary restriction." *Coffee-Rich, Inc. v. Commissioner of Public Health*, 348 Mass. 414, 425. *Mansfield Beauty Academy, Inc. v. Board of Registration of Hairdressers*, 326 Mass. 624, 627.

It may be the Board's opinion (based on its experience) that facts could be adduced to show that in a hairdressing shop maintained within the same area as another place of business from which such shop is totally unenclosed, "standards of professional skill" are likely to suffer and "proper supervision of hairdressers . . . [and] beauty shops" becomes difficult. If so, my opinion is that the regulation contained in your letter may be applied to prohibit the operation of beauty shops under the conditions described in part (a) of your question.

On the other hand, if there is any rational distinction between the operation of beauty shops in separate stores and private homes (operation of shops in the latter may not be prohibited by the Board in accordance with § 87CC) and the operation of such shops in enclosed

areas that happen to be located within other unrelated business (e.g., department stores), I am unable to perceive it. This regulation does not appear to advance "the establishment of proper standards of professional skill in relation to, and the proper supervision of, hairdressers . . . [or] beauty shops," nor does it appear to be a "sanitary rule." Obviously, the rule is not related to the "necessary conduct of [the Board's] business." If the purpose of the rule is to "limit the number of . . . beauty shops," (certainly this limitation is likely to be, at least, an incidental effect of the rule), the rule is prohibited by the explicit terms of G. L. c. 112, § 87CC. In any event, I am unable to see how the prohibition of beauty shops in an enclosed room which happens to be within a separate business is in any way related to the legitimate authority of the Board, and I am of the opinion that the regulation in question as applied in part (b) of your question is not "within the ambit of the enabling statute." *Commonwealth v. Diaz, supra*. Adoption of this rule to prohibit such a shop would not appear to be authorized by the Legislature.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

In the absence of very clear statutory language, legislation is not applied retroactively in such a manner as to affect substantive rights. Consequently, the Board of Registration of Hairdressers cannot refuse to register a school, previously approved, for non-compliance with regulations adopted subsequent to approval of said school.

APRIL 18, 1966.

MRS. IRENE E. BODE, *Chairman, Board of Registration of Hairdressers*.

DEAR MRS. BODE:—In a recent request for an opinion you state:

"On December 21, 1965 the Broms Academy applied for registration as a school instructing in hairdressing pursuant to General Laws, Chapter 112, Section 87BB.

"On December 29, 1965, the school was inspected by the full Board. Upon inspection, the school was found to meet the standards set forth in the statutes (see General Laws, Ch. 112, Sec. 87T *et seq.*) and the applicable regulations.

"The Director of the School verbally was informed that his school met these standards, but that registration would not be issued until approval of the school by the Department of Public Safety (see General Laws, Ch. 143). The Department has since granted its approval.

"On February 16, 1966, new regulations for the operation of hairdressing schools were adopted by the Board (see General Laws, Ch. 112, Sec. 87CC) and filed with the Secretary of the Commonwealth (General Laws c. 30A, § 5).

"The effect of these new regulations, among other things, is to increase the bond which new schools must file with their applications, to increase the number of students who must be enrolled at the time of registration

of the school, and to increase the amount of professional equipment which a school must maintain in order to be registered.

"If these new regulations had been in force at the time that the Broms Academy was inspected the school would not have met these requirements."

You then ask:

"In view of the fact that there is no provision in the new regulations explicitly requiring prospective or retrospective operation thereof, may the Board now refuse to register Broms Academy for non-compliance with the new regulations?"

It appears that the new regulations are not being applied to schools registered before they took effect. In the circumstances indicated in your letter, to apply the new regulations to the Broms Academy would be to apply them retroactively: see *Cohen v. Board of Registration in Pharmacy*, 1966 Mass. Adv. Sh. 231, 235, fn 4; *Barber v. Barber*, 327 Mich. 5, 12. The Supreme Judicial Court has held, with numerous citations: "At least in the absence of very clear statutory language, we do not apply legislation retroactively in such a manner as to affect substantive rights." *Building Inspector of Acton v. Board of Appeals of Acton*, 348 Mass. 453, 456-457. The right to operate an academy to train hairdressers is doubtless a "substantive" right. See *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 495-499. And what the Court said about retroactive operation of acts of the Legislature would apply, at least equally, to administrative regulations. *Miller v. United States*, 294 U.S. 435, 439, rehearing denied, 294 U.S. 734. I conclude that the new regulations do not apply to the present registration of Broms Academy and that the Board's question should be answered in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Persons who perform remunerative work for "any educational institution, or school system, public or private," in whatever capacity, whether full or part-time and whether for all or part of the calendar or academic year, are "employed" thereby, and retired employees of any such institution who receive regular retirement benefits from their institutions or school committees receive regular compensation therefrom. Consequently, they are precluded from sitting on the Board of Higher Education, although, if the institution or school system by which they are employed or from which they receive compensation are located outside the Commonwealth, they may be appointed to the Board of Education, or as trustees of the Board of State Colleges.

APRIL 18, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—In a recent letter you state:

"In several sections of Chapter 572 of the Acts of 1965 restrictions are

placed on the eligibility of members who serve in the school and collegiate systems of the Commonwealth. . . .

"As the new Advisory Council on Education examines the backgrounds of individuals to be nominated for the Governor's consideration in appointing members to the new Board of Education and the new Board of Higher Education, questions have been raised as to how restrictive the statutory language is. Specifically, could a distinguished lawyer or surgeon who teaches part-time at a college or university be considered as eligible for membership?"

Section 1A of G. L. c. 15 (as inserted by St. 1965, c. 572, § 2) which establishes the Board of Higher Education, contains the following language:

"No member of said board shall be employed by or derive regular compensation from any educational institution, or school system, public or private."

This language is substantially repeated in G. L. c. 15, § 1E (as inserted by St. 1965, c. 572, § 2), which provides for the Board of Education: in c. 15, § 1H (as inserted by c. 572, § 2), which provides for the Advisory Council on Education; and in c. 15, § 20A (as inserted by c. 572, § 3), which establishes the Board of Trustees of State Colleges. However, in §§ 1E, 1H and 20A the words "in the commonwealth" are inserted after the word "private."

I am aware of the fact that in the contemporary college and university a significant part of the faculty and staff may consist of persons whose connection with the institution is less than "full-time." These persons may be designated as teaching fellows, research associates, lecturers or by other titles too numerous to categorize. As you point out, "their livelihoods are earned in a profession separate from the field of education, and their part-time services represent a contribution to the general academic world." I must assume that the Legislature was also aware of this fact when it enacted St. 1965, c. 572. *Everett v. Commissioner of Corporations & Taxation*, 317 Mass. 612, 615. Nevertheless, it chose broad terms to express the prohibition against service on certain boards by persons connected with education in various ways. Its apparent purposes were to ensure that the members of these boards would be unbiased and unfettered in their judgments and to avoid rivalries between schools and school systems for "places" on the various boards.

In your letter you ask for my "opinion on the professional limitations as contained in [St. 1965] Chapter 572." I cannot possibly attempt an abstract determination of eligibility for service on boards, but the following guidelines may be helpful:

1. Persons who give occasional lectures, take part in random seminars or panels or do infrequent substitute teaching are not employees of the institutions or school systems which receive their services. See *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717-718 (C.C.A. 2); *Miller & Rose v. Rich* 195 Wis. 468, 470-471. If they receive honorariums for their services, these do not constitute "regular compensation." See *Ocean Accident & Guarantee Corp. v. Carter*, 62 Ga. App.

188, 191. Such services, *per se*, do not disqualify the person rendering them from sitting on the boards in question.

2. Persons whose books have been published by college or university-owned presses and who receive royalties therefrom do not, because of this fact alone, receive "regular compensation" from these institutions, unless such persons are under contract to write several books or series of books over a period of time and receive compensation at regular intervals.

3. All other persons who perform remunerative work for "any educational institution, or school system, public or private," in whatever capacity, whether full or part-time and whether for all or part of the calendar or academic year, are "employed" thereby. Thus, to consider the example you pose, a lawyer or surgeon who teaches on a regular basis but for only a short period each week is employed by the institution at which he teaches. See *Bulton v. Day*, 204 Va. 547, 557-558, holding that a professor employed half-time at the University of Virginia Law School was a "regular employee" of the Commonwealth of Virginia and, therefore, was precluded from receiving salary for services rendered to a bar association. It would seem *a fortiori* that such a person is an "employee" of the institution at which he teaches, whether or not his status is deemed "regular." See also *De Weerd v. Springfield*, 295 Mass. 523, 526.

4. Retired employees of "any educational institution, or school system, public or private," who receive regular retirement benefits from their institutions or school systems receive "regular compensation" therefrom. See *Everett v. Commissioner of Corporations & Taxation*, 317 Mass. 612, 615.

All persons included in categories 3 and 4 above are precluded from sitting on the Board of Higher Education by the language of G. L. c. 15, § 1E (as inserted by St. 1965, c. 572). Such persons, however, may be appointed to the Board of Education (§ 1E) or as Trustees of the Board of State Colleges (§ 20A) if the institutions or school systems by which they are employed or from which they receive compensation are located outside the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Disbursements from the treasury, under G. L. c. 58, §§ 18 and 20, require the approval of the Governor and Council as a condition precedent.

APRIL 20, 1966.

HON. ROBERT Q. CRANE, *Treasurer and Receiver General*.

DEAR SIR:—You have requested my opinion as to whether the "treasury [may] disburse" certain of its revenues to cities and towns without the approval of the Governor and Council. The disbursements are those required by G. L. c. 58, §§ 18 and 20.

No purpose would be served by quoting these statutes. I do quote Pt. 2, c. 2, § 1, Art. 11 of the Constitution of Massachusetts.

"No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

Since all of the revenues which are to be distributed pursuant to G. L. c. 58, §§ 18 and 20 are constitutionally required to be paid into the treasury (Art. 63, § 1 of the Articles of Amendment), these revenues cannot be paid out except by warrant of the Governor with the advice and consent of the Council. *Opinion of the Justices*, 13 Allen 593. *Opinion of the Justices*, 302 Mass. 605, 612. Inasmuch as neither § 18 nor § 20 "purport[s] to deprive the Governor and the Council" of their constitutional authority under Pt. 2, c. 2, § 1, Art. 12, the statute should be interpreted as requiring approval of the Governor and the Council as a condition precedent to disbursement thereunder. *Opinion of the Justices*, 309 Mass. 609, 626.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The manner in which the proper care and treatment of the mentally retarded and mentally ill is better achieved is a matter for the Dept. of Mental Health to determine on the basis of its expert understanding of the problems involved.

Except for patients voluntarily admitted or committed for observation under G. L. c. 123, § 77, any patient may be transferred who in the opinion of the Department is a proper subject for care and treatment in the institution to which he is to be transferred.

APRIL 20, 1966.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health*.

DEAR COMMISSIONER SOLOMON:—In a recent request for an opinion, you point out that the "overcrowding in the State Schools [for the mentally retarded] . . . has created a major problem." In view of this problem, you ask the following questions:

"1. May mentally retarded persons be committed or admitted to State Hospitals as opposed to state schools (for the retarded) as provided in the various commitment and admission sections of Chapter 123 of the General Laws, as amended?

"2. May I establish at our State Hospitals a separate section for the mentally retarded?

"3. If the answer to No. 2 above is in the affirmative, may I intermingle the care and treatment of the mentally retarded with the mentally ill?

"4. May I transfer mentally retarded patients from the State Schools for the retarded to the State Hospitals, for care and treatment and for the purpose of relieving overcrowding in the State Schools?

"5. May epileptic mentally retarded persons be committed or admitted to State Hospitals in addition to the Monson State Hospital, as provided in the commitment and admission sections of Chapter 123 of the General Laws, as amended?

"6. May I transfer epileptic mentally retarded patients from the Monson State Hospital to other State Hospitals for the same purposes as outlined in No. 4 above?"

Except for questions 2 and 3, which I shall consider separately, each of the above questions may be answered with reference to G. L. c. 123, § 20 which states:

"The department, subject to section twenty A, may transfer to and from any hospital or school any patient who in its opinion is a proper subject for care and treatment in the institution to which he is to be transferred, except that no patient shall be transferred between institutions while he is present as a voluntary patient, or while committed for observation under section seventy-seven."

Section 20A of G. L. c. 123 pertains to special problems concerning the treatment of veterans and does not appear to be applicable to your questions. The language of § 20 is clear. Except for patients voluntarily admitted or committed for observation under G. L. c. 123, § 77, any patient may be transferred who in the opinion of the Department is a proper subject for care and treatment in the institution to which he is to be transferred. *Adams v. Inhabitants of Ipswich*, 116 Mass. 570, 572. Attorney General's Report (1943) p. 139.

I am unable to answer questions 2 and 3, as presented. I assume that the Department would not disobey the clear intent of the statute by transferring a patient to an institution where he would not be a proper subject for care and treatment. Whether the proper care and treatment of the mentally retarded and the mentally ill is better achieved by segregation or integration of these groups is a matter for the Department of Mental Health to determine on the basis of its expert understanding of the problems involved.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The actions of the Board of Trustees, at its meeting on January 20, 1966, defining the duties of the President of Lowell Technological Institute and voting to file the job description of the Office of President, were within the scope of its authority. However, their vote to fix and approve the salary of the Office of President was outside the scope of its then current authority.

The salary approved by the trustees on January 20, 1966, cannot be paid to the President until action by the Trustees is properly taken after the effective date of c. 828, Acts of 1965.

MAY 3, 1966.

HON. SAMUEL PINANSKI, *Chairman, Board of Trustees, Lowell Technological Institute.*

DEAR MR. PINANSKI:—You have requested my opinion with regard to the legality of certain actions taken by the Board of Trustees of Lowell Technological Institute, at their meeting of January 20, 1966, in defining the duties and fixing the salary of the President of the Institute.

You state the following as facts:

“Consideration was directed to the need for revision in the method of employment and payment of the President of Lowell Technological Institute particularly as this same subject was treated in Chapter 828 of the Acts of 1965. (It was acknowledged by all trustees present that Chapter 828 of the Acts of 1965 would become effective not before April 4, 1966). Mindful of this the trustees directed, by appropriate vote unanimously agreed upon: (1) to define the duties of the President of Lowell Technological Institute as the trustees are authorized and directed to do by section 12 of Chapter 75A of the General Laws; (2) to file the descriptive job specifications relating to this position with the officers and committees enumerated in the same said Section 12; and (3) to fix and approve the salary of the President of Lowell Technological Institute, effective not sooner than 90 days after the signing of Chapter 828 of the Acts of 1965, at the weekly rate of \$448.20—which approved rate will then ‘not exceed the salary rates in the professional salary schedule in section forty-six B of Chapter thirty.’”

On the basis of the above facts, you have specifically asked the following two questions:

“*Question 1.* Do the actions of the Board of Trustees at the meeting of January 20, 1966 comply with the requirements of Section 12 of Chapter 75A of the General Laws as amended by Chapter 701 of the Acts of 1963, Chapter 801 of the Acts of 1963, Chapter 357 of the Acts of 1964, and Chapter 828 of the Acts of 1965?”

“*Question 2.* May the amount approved by the Board of Trustees at their meeting of January 20, 1966, to take effect not sooner than April 4, 1966, be paid to the employee entitled thereto?”

With regard to your first question, the law of this Commonwealth regulating the Board of Trustees of Lowell Technological Institute in this context is contained in G. L. c. 75A, § 12, as amended by c. 701 of

the Acts of 1963, c. 801 of the Acts of 1963, c. 357 of the Acts of 1964 and c. 828 of the Acts of 1965, which became effective on April 3, 1966. Chapter 75A, § 12, as amended, prior to the effective date of c. 828 of the Acts of 1965, provided in part as follows:

"The trustees shall elect the president . . . and shall define the duties and tenure of office in accordance with the appropriate laws of the commonwealth; . . . the president shall be paid a salary of eighteen thousand dollars, and shall devote his full time during business hours to the duties of his office.

* * * * *

"The classification, title, salary range within the general salary schedule, and descriptive job classifications for each position shall be determined by the trustees for each member of the professional staff and copies thereof shall be placed on file with the governor, budget director, director of personnel and standardization and with the joint committee on ways and means. . . ."

Chapter 828 of the Acts of 1965, however, added the following provision:

"The president shall devote his full time during business hours to the duties of his office and he shall be paid such salary as the board of trustees may approve; provided, however, that the said salary shall not exceed the salary rates in the professional salary schedule in section forty-six B of chapter thirty."

At its meeting of January 20, 1966, the Board of Trustees voted to define the duties of the President of Lowell Technological Institute. The express, unequivocal language of c. 75A, § 12, as amended, manifestly gives the Board of Trustees of Lowell Technological Institute the authority to define the duties of the Office of President. Consequently, the action of the trustees in voting to so define the duties of the President is clearly within the scope of their statutory authority.

As a second action, the Board of Trustees voted to file the descriptive job specifications of the Office of President with the Governor, Budget Director, Director of Personnel and Standardization and the Joint Committee on Ways and Means. Chapter 75A, § 12, paragraph 9, expressly requires the Board of Trustees to file descriptive job specifications with the offices and committees enumerated above. Consequently, in voting to file as indicated, the trustees quite properly adhered to the procedural requirements of c. 75A, § 12, as amended, and thereby acted properly in this context.

As a third action taken, the Board of Trustees voted to fix and approve the salary of the President of Lowell Technological Institute in accordance with the provisions of c. 828 of the Acts of 1965, to take effect as of the effective date of that Chapter. In this instance, it is my opinion that the Board of Trustees did not act within the scope of its authority. Since the amendment of c. 75A, § 12 by c. 828 of the Acts of 1965 was not effective until April 3, 1966, the Board of Trustees as of January 20, 1966 had no authority under c. 828. Consequently, in

attempting to fix the salary of the President under authority granted by a then merely prospective amendment, the Board of Trustees did not act within the scope of its then current authority. Had the Legislature intended that the Board of Trustees be able immediately to utilize the authority of c. 828, that Chapter would presumably have been promulgated with an emergency preamble. In the absence of such an emergency preamble, it is clear that pursuant to Article 48 of the Amendments to the Constitution the effective date of c. 828 is ninety days after its approval. Consequently, only on or after April 3, 1966, when c. 828 of the Acts of 1965 which was approved on January 3, 1966 became effective, would the Board of Trustees be able legally to vote a salary under the provisions of that Chapter.

Regarding your second question, it is my opinion that the answer thereto is in the negative. Since c. 828 of the Acts of 1965 did not become effective until April 3, 1966, the Board of Trustees on January 20, 1966 had no authority under that Act to vote a salary. Their action in doing so at that time was, therefore, a nullity. Consequently, the salary approved by the Trustees on January 20, 1966 cannot be paid to the President until action by the Trustees is properly taken after the effective date of c. 828.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The salaries of the Associate Commissioners and the Assistant Commissioners of Education are to be established by the Board of Education.

The salary of the Deputy Commissioner is to be fixed pursuant to the authority vested in the Director of Personnel and Standardization by G. L. c. 30, § 45.

MAY 3, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—In a recent request for an opinion, you point out that G. L. c. 15, § 1F (added by St. 1965, c. 572, § 2) “authorizes the Board of Education to appoint two Associate Commissioners and three Assistant Commissioners [of education], and further states it [the Board] ‘. . . shall establish their salaries.’” In view of this language, you ask:

“Does this mean the Board can set the salaries for these positions or is it limited to setting salaries within the professional salary schedule as set forth in Chapter 30, Section 46 of the General Laws and only with the approval of the Director of Personnel and the Commissioner of Administration, in which instance the maximum Job Group is 33P?”

I quote the relevant language of G. L. c. 15, § 1F.

“The board shall, by a majority vote of all its members, appoint the associate commissioners and the assistant commissioners, and shall establish their salaries.”

I am aware that on at least one occasion an Attorney General has ruled that the explicit power given to an agency of the Commonwealth to fix the salaries of certain employees was to be exercised subject to G. L. c. 30, § 46. VI Op. Atty. Gen., 601, 603.

On two other occasions, however, an Attorney General has taken a contrary position. Attorney General's Report (1958) p. 49. Attorney General's Report (1961) pp. 98-101. The latter opinion, given to the Commissioner of Administration, seems particularly well reasoned in holding that the authority of the Government Center Commission to fix the salary of its Executive Secretary is not subject to the powers of the Director of Personnel and Standardization or those of the Commissioner of Administration under G. L. c. 30, § 46. As the Attorney General indicated (p. 100):

"As was pointed out in the case of *Boston Elevated Railway v. Commonwealth*, 310 Mass. 528, 551, an earlier general statute is not binding on subsequent legislatures so as to restrict their power to enact statutes inconsistent therewith, and 'The earlier statute has no higher standing than the later and may be superseded thereby wholly or in part when such is the clear legislative intention.'

"Which of the two statutory provisions here in question is to prevail is not to be determined solely by the language of the earlier as to what should be exceptions to it, but is rather to be determined by an examination of both statutes, and if the provisions of the later are inconsistent with the operation of the earlier, the provisions of the later must prevail. This is particularly true where, as in this case, the earlier provisions are of general application and the later is of specific application. *Posadas v. National City Bank*, 296 U.S. 497."

This language is relevant to the instant question, since G. L. c. 30, § 46B (which concerns the salaries of professional employees and presumably would govern the salaries of the Associate and Assistant Commissioners) was enacted in 1963 (see St. 1963, c. 775, § 3), whereas G. L. c. 15, § 1F was enacted in 1965.

Furthermore, G. L. c. 30, §§ 46 and 46B (Parts of § 46 are incorporated by reference into § 46B by virtue of the first paragraph thereof) are general statutes fixing salaries for employees of the Commonwealth, whereas G. L. c. 15, § 1F is a specific statute governing (*inter alia*) the establishment of salaries for assistant and associate commissioners. It is a well-settled principle of statutory construction that a special statute will control one that is general. *Copeland v. Mayor & Aldermen of Springfield*, 166 Mass. 498, 504. *Worcester v. County Commrs.*, 167 Mass. 565. *Boston & Albany R.R. v. Public Service Comms.*, 232 Mass. 358. *Cohen v. Price*, 273 Mass. 303, 308. *Clancy v. Wallace*, 288 Mass. 557, 564.

When the Legislature saw the possibility of reasonable doubt as to whether compensation paid to a state employee would be subject to G. L. c. 30, §§ 46 or 46B and intended that it should be subject to these statutes, it stated its intention unmistakably. See, for example, G. L. c. 12, § 2, concerning the compensation of the Chief Clerk in the Office of the Attorney General. Absent such a statement of intention in G. L. c.

15, § 1F, the statute must be presumed to mean what it says: that the salaries of the Associate and Assistant Commissioners shall be established by the Board of Education.

You also ask:

"If the Board is not limited to the salary schedule and the maximum step of Job Group 33P, what is the position of the Deputy Commissioner who is now on the salary schedule at Job Group 27P?"

Since, as you point out, St. 1965, c. 572 is silent as to any authority of the Board of Education or any other agency to establish the salary of the Deputy Commissioner, it must be fixed pursuant to the authority vested in the Director of Personnel and Standardization by G. L. c. 30, § 45 to "classify all appointive offices and positions in the government of the commonwealth," with certain exceptions not relevant to this opinion.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Chapter 123, § 96, M.G.L., does not authorize the Commission on Administration and Finance to establish higher rates for insured patients than for patients who are not insured.

MAY 4, 1966.

HON. HARRY C. SOLOMON, M.D., *Commissioner of Mental Health*.

DEAR DOCTOR SOLOMON:—You have requested my opinion as to "whether or not the Commission on Administration and Finance has the authority to establish different rates of support for patients who are covered by group hospitalization insurance plans." The patients in question are inmates of the various institutions operated by the Department of Mental Health; the authority of the Commission to establish rates for such patients in general is set forth in G. L. c. 123, § 96. The relevant portion of this statute reads as follows:

"The price for the support of inmates of state hospitals, except for insane inmates of the Tewksbury state hospital and infirmary and of the Bridgewater state hospital shall be determined for each person by the department on the basis of *the actual weekly cost of care* as determined by the commission on administration and finance annually on or before October first in each year for each person, and may be recovered of such persons or of the husband, wife, father, mother or child, if of sufficient ability. A married woman shall be subject to the said liability as though sole. Such action shall be brought by the attorney general in the name of the state treasurer. . . ." [Emphasis supplied.]

According to your letter the per diem rate now in effect for patients in state mental hospitals is \$4.50 for uninsured parties and \$6.00 for patients whose charges are "payable by third parties such as the Veterans Administration and insurance companies" except that in the Massachusetts Mental Health Center the per diem rate is \$23.00 and \$25.00, respectively. You add that "many insurance companies have questioned . . . the additional charges and have refused to pay them."

You list the following "additional services furnished" to insured patients which you say justify the higher charges to them at both the Mental Health Center and other hospitals:

"(a) The setting of the higher rate of support when insurance coverage is ascertained.

(b) The obtaining of a diagnosis from the institution.

(c) The preparation and forwarding of a claim form by the Department.

(d) The preparation of a duplicate bill to be sent to the Insurance Company.

(e) The obtaining of a signature to authorize the release of mental and physical condition information.

(f) The obtaining of an assignment of benefits.

(g) The reduction in the rate of support when the insurance coverage has terminated."

I am of the opinion that the rates issued by the Commission under G. L. c. 123, § 96 are regulations (*Massachusetts General Hospital v. Cambridge*, 347 Mass. 519, 522) and are thus subject to the familiar rule that administrative regulations must be "within the ambit of the enabling statute." *Commonwealth v. Diaz*, 326 Mass. 525, 527-528. *Winthrop v. New England Chocolate Co.*, 180 Mass. 464, 466. Cases from other jurisdictions collected at 2 Am. Jur. 2d §§ 300, 301, 303. Under G. L. c. 123, § 96, the enabling statute for the Commission to determine charges, the "price for the support of inmates of state hospitals" must be based on the "actual weekly cost of care."

It does not seem that any of the "services furnished" to insured patients which I have quoted from your letter constitute part of the "actual . . . cost of care" for such patients. Items (a) and (g) on your list are costs incurred by the setting of higher rates for insured patients; these costs are not occasioned by the treatment of such patients as your letter would imply. Items (b), (c), (d), (e) and (f) seem to be routine bookkeeping costs incurred in obtaining payment from insurance companies; they do not appear to be related to the "care" (see *Johnson v. St. Paul & Western Coal Co.*, 131 Wis. 627, 632) that the patient receives. Furthermore, the cases in this Commonwealth indicate that the term "actual cost" generally does not include ancillary expenses. *Newton, petitioner*, 172 Mass. 5, 9-11. *Fillmore v. Johnson*, 221 Mass. 406, 412-413. Cf. *Boston Molasses Co. v. Molasses Distributors Corp.*, 274 Mass. 589, 595. When the Legislature intended that a third party be made liable for a patient's hospital expenses, medical assistance and medical care generally, as opposed to the "actual cost of care," it stated this intention explicitly. See, e.g., G. L. c. 117, § 24; c. 118, § 2; c. 118A, §§ 1 and 14; c. 152, § 30. It is not necessary to determine at this time whether, under any of the aforementioned statutes, the party liable for the patient's care could be made to pay such costs as are comprehended in items (b)-(f). In any event, I conclude that the Legislature, in G. L.

c. 123, § 96, did not authorize the Commission to set higher rates for insured patients than for patients who are not insured.

I am mindful of the constitutional questions that might arise if legislation were enacted permitting the Commission to set higher rates for insured patients, particularly in view of an earlier opinion of this office [Attorney General's Report, 1961, p. 60] that such rates could not be charged to persons insured by Blue Cross. See *Associated Hospital Service of Maine v. Mahoney*, 213 A.2d 712, 722-723 (Me.). While it is unnecessary to consider such questions in this opinion, I note in passing that where administrative regulations are likely to raise constitutional problems, it is particularly important to determine that such regulations reflect a policy ordained or at least permitted by the Legislature. *Treasurer of Worcester v. Department of Labor and Industries*, 327 Mass. 237, 241.

You state in your letter: "The higher charges [now purportedly in effect] for support [of insured patients] were established in conformity with the opinion of the Attorney General, dated April 6, 1955, (unpublished) due to the additional services furnished." Upon perusal of the 1955 opinion, signed by an Assistant Attorney General, I find that it pertains to the setting of higher rates only for patients who are veterans and for whose expenses the Veterans Administration is responsible. Since, according to your letter, the Veterans Administration "does not object to the higher rate of the support charges," there is no present need to reconsider that opinion.

Considering the constitutional questions which could be created by the practice of imposing higher payment rates upon third parties, I am compelled to give the statute which governs this matter a strict reading. Had the Legislature intended expenses of a bookkeeping nature such as those enumerated by you to be chargeable under this section, it presumably would have used a phrase somewhat broader than "the actual weekly cost of care." Accordingly, it is my opinion that c. 123, § 96 does not authorize the establishment of higher rates for insured patients than for patients who are not insured.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Where the Board of Fire Prevention Regulations has established rules and regulations relating to oil burner equipment, the responsibility for enforcement of these rules rests with the parties enumerated in G. L. c. 148, § 4, i.e., the State Fire Marshal, an inspector, the head of a fire department, or a person delegated by the Marshal or the head of the fire department.

Since the responsibility for the oil burner apprentice and his work rests with the certified technician, it would appear that the performance of those tasks which involve some danger or complexity should be accomplished either personally by the certified technician or under his close personal supervision.

MAY 5, 1966.

HON. LEO L. LAUGHLIN, *Commissioner of Public Safety.*

DEAR COMMISSIONER LAUGHLIN:—You have requested my opinion with regard to the enforcement of the laws governing oil burner construction, installation and operation and with regard to the supervision of apprentice oil burner technicians. Your first question is as follows:

“Once an examiner has granted a certificate as oil burner technician, upon whom does the duty of enforcement of the law and rules and regulations relative to oil burner construction, installation and operation of oil burner equipment lie; upon the inspectors of the Division of Inspection, Department of Public Safety or upon the Marshal, an inspector or police officer of the Division of Fire Prevention of the Department of Public Safety or the head of the fire department or person designated by them?”

The duties of the Division of Inspection of the Department of Public Safety with regard to oil burner technicians are set out in the following sections:

Chapter 146, § 67A provides that:

“The chief of inspections, the supervising inspector of the division or an inspector of the division shall act as an examiner for the certification of oil burner technicians. The chief of inspections shall cause examinations to be held in such cities and at such times as he may deem necessary.”

Chapter 148, § 10D provides in part that:

“Any person desiring to obtain a certificate as an oil burner technician shall make application to the department . . . the applicant shall be examined . . . and, if found by an examiner to be qualified, he shall forthwith be issued a certificate. . . .”

Chapter 148, § 10G provides that:

“Any certificate may, after due notice and hearing, be suspended or revoked by an examiner for a violation by the certificate holder of any rule or regulation promulgated by the board relative to construction, installation and operation of oil burning equipment. Any applicant for an oil burner technician certificate or holder of such certificate aggrieved by the action of an examiner in refusing to issue or in revoking or

suspending such certificate may, within ten days, appeal therefrom to the chief of inspections of the department, who shall designate three inspectors to sit as a board and to conduct a hearing on such appeal within thirty days. The decision of said board shall be final."

The above-quoted sections govern the duties of the Division of Inspection. Under the concise language of those sections, those duties are quite narrow. In substance, the duties of members of the Division of Inspection include acting as examiners for oil burner technicians, administering the examinations, issuing licenses, suspending or revoking licenses after holding hearings, and hearing appeals from such suspensions or revocations. There is no basis in the language of either c. 146 or c. 148 for concluding that the duties of the Division of Inspection are any more extensive than indicated above. The only power of the Division of Inspection to act in the enforcement of the rules and regulations promulgated by the Board of Fire Prevention Regulations in this context is that arising out of its authority under c. 148, § 10G to suspend or revoke licenses upon proof of violation thereof. This authority of the Division of Inspection to sit in judgment, however, does not permit the conclusion that such authority also includes the duty or even the right directly to enforce those rules and regulations. Consequently, in the absence of any express statutory provision to that effect, there is no basis upon which to predicate the existence of any such direct duty of enforcement in the division of Inspection.

With regard to the Division of Fire Prevention Regulations of the Department of Public Safety, the duties of that agency are contained generally in G. L. c. 148. The following sections have particular relevance to the question which you have asked.

Chapter 148, § 4 provides in part as follows:

"The marshal, an inspector, the head of the fire department, or any person to whom the marshal or the head of the fire department may delegate the authority, *may, in the performance of the duties imposed by this chapter, or in furtherance of the purpose of any provision of any law, ordinance or by-law relating to the subject matter of this chapter, or of any rule or regulation of the board of fire prevention regulations, established under section fourteen of chapter twenty-two, in this chapter referred to as the board, or any order of the marshal or head of the fire department, enter at any reasonable hour any building or other premises, or any ship or vessel, to make inspection or investigation, without being held or deemed to be guilty of trespass.*" [Emphasis supplied.]

Chapter 148, § 5 provides in part as follows:

"The marshal, the head of the fire department or any person to whom the marshal or the head of the fire department may delegate his authority in writing, may, and upon complaint of a person having an interest in any building or premises or property adjacent thereto, shall, at any reasonable hour, enter into buildings and upon premises, which term for the purposes of the remainder of this section shall include alleys adjacent thereto, within their jurisdiction and make an investigation as to the existence of conditions likely to cause fire. They shall, in writing, order such conditions to be remedied. . . ."

Chapter 148, § 10 provides in part as follows:

"The board of fire prevention regulations shall make, and from time to time may alter, amend and repeal, rules and regulations relative to fire prevention which said board is authorized or required under any provision of this chapter to adopt or make. . . ."

Under the provisions of c. 148, § 10, quoted above, it is clear that the duty to make rules and regulations relative to fire prevention rests with the Board of Fire Prevention Regulations. In compliance with the duty imposed on them by § 10, the Board has established rules and regulations governing the construction, installation and operation of oil burner equipment. These rules and regulations are contained in bulletin FPR-3.

The enforcement of the rules and regulations of FPR-3 is provided for in §§ 4 and 5 of c. 148. Section 4 of that chapter grants express authority to the fire marshal, an inspector, the head of the fire department or any person to whom the marshal or the head of the fire department may delegate such authority to inspect and investigate any building, premises or ship in furtherance of any rule or regulation of the Board of Fire Prevention Regulations. By virtue of this grant of authority, it is clear that the duty of inspection and investigation includes the duty to enforce the rules of the Board. Thus, where the Board has promulgated rules and regulations relating to oil burner equipment, the responsibility for enforcement of these rules rests with the parties enumerated in § 4: *i.e.*, the marshal, an inspector, the head of the fire department, or a person delegated by the marshal or head of the fire department.

Section 5 of c. 148, which grants authority to the marshal and the head of the fire department or their delegates to investigate complaints and order remedial efforts, similarly imposes a duty upon those parties to enforce the rules and regulations of the Board of Fire Prevention Regulations.

Regarding your second question, the law of this Commonwealth relative to the licensing of apprentice oil burner technicians is set out in G. L. c. 148, § 10E, which provides as follows:

"An examiner shall upon payment of three dollars issue without examination an apprentice certificate to any person who applies therefor, which certificate shall permit him to assist and work under the supervision of a person holding a certificate as an oil burner technician in the alteration, repair or installation of oil burning equipment. An apprentice certificate shall be valid for two years from the date of issue, and shall be renewed without examination upon the payment of three dollars."

Under the language of this section, the granting of an apprentice certificate requires only the filing of an application and payment of the statutory fee. Neither an examination nor educational qualifications are required. In view of the absence of educational requirements, it is possible that an apprentice certified under this section may have little or no knowledge of the mechanical operation and/or the installation of oil burner equipment. To cope with the possibility of harmful consequences

flowing from such a lack of knowledge, § 10E requires that such an apprentice merely "assist and work under the supervision of a person holding a certificate as an oil burner technician. . . ." The question you raise is whether the provision for supervision in § 10E means constant supervision.

It is my opinion that the phrase, "under the supervision," does not require constant supervision of the apprentice by the certified oil burner technician. A requirement that the certified oil burner technician remain in one location as supervisor would preclude any freedom to attend to other aspects of the same job or even other jobs. As a result, the advantage of having an apprentice to assist would not be fully realized.

This is not to say, however, that an apprentice is free to work wholly unsupervised. Clearly, § 10E does not contemplate such a degree of freedom. Rather, in view of the absence of educational requirements for the apprentice certificate, supervision must be exercised.

The amount of supervision must—in the first instance—be determined by the certified oil burner technician, who will ordinarily best be able to evaluate the ability of that apprentice to work with minimal supervision. The amount of supervision required will of course depend upon the facts of each case, as well as upon the personalities and relative skills involved. Nevertheless, since the responsibility for the apprentice and his work rests with the certified technician, it would appear that the performance of those tasks which involve some danger or complexity should be accomplished either personally by the certified technician or under his close personal supervision.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The power to lease public property is of such a nature that it requires specific statutory authority as a condition to its exercise.

Accepted principles of administrative law require that an agency should evaluate the situations presented it on the basis of its own expertise, and that it make appropriate decisions in conformity to the legislative policy and purpose.

The decision of the Department of Natural Resources to authorize a ski development should be implemented by means of a permit rather than by means of a lease.

MAY 6, 1966.

HON. CHARLES H. W. FOSTER, *Commissioner of Natural Resources*.

DEAR SIR:—Your recent letter indicates that you have received a large number of requests for permission to use the lands and waters under the control and supervision of your Department. You have drawn to my attention a number of situations where permission to use these lands is sought.

The General Court has charged your Department with the care and control of the Commonwealth's natural resources. Those resources, as

they relate to your request, include wild mammals, game, wild birds, forests and uncultivated flora, land, soil and soil resources, lakes, ponds, streams, and surface waters. See G. L. c. 21, § 1. The protection and conservation of these resources are among your Department's chief duties. However, the use of these resources for certain purposes is not precluded.

"It shall be the duty of [the] department to exercise general care and oversight of the natural resources of the commonwealth and of its adjacent waters; . . . and to propose and carry out measures for the protection, conservation, control, use, increase, and development thereof." G. L. c. 21, § 1.

Specific provision has been made for the recreational use of such resources.

"The department shall also be concerned with the development of public recreation as related to such natural resources; and shall have control and supervision of such parks, forests, and areas of recreational, scenic, or historic significance as may be from time to time committed to it." G. L. c. 21, § 1.

Thus, your responsibility is to protect, to conserve and to increase our natural resources while at the same time being concerned with the development of public recreation. No use of the lands under your control other than for conservation or recreational purposes is provided for in the General Laws with the exception that towers necessary for the transmission of electricity may be built. See G. L. c. 132A, § 3.

Any conflicts between these dual responsibilities have been resolved by the legislative emphasis on the conservation aspect of your duties. Such emphasis appears in G. L. c. 21, § 1. Moreover, in G. L. c. 132A, which specifically deals with the establishment of State Recreation Areas, there are express provisions to effectuate the Commonwealth's interest in the conservation of natural resources. Thus the Commissioner of Natural Resources may accept gifts and bequests "to be used for the purpose of advancing the recreational and conservation interests and policies of the commonwealth." [Emphasis supplied.] G. L. c. 132A, § 1. And the policy of the Commonwealth is one of preserving the natural state of Recreation Areas.

"It is hereby declared to be the policy of the commonwealth that all such sites acquired or developed by the commissioner [of natural resources] shall in so far as practicable be preserved in their natural state". . . . G. L. c. 132A, § 2B.

There can be no doubt that the recreational value of our natural resources is dependent upon their preservation, conservation and increase. Uses which would endanger these resources would undoubtedly not be legal. Each case must of course be decided upon its own facts; but the following may provide some helpful guidelines.

When it is consistent with the policies discussed above, provision may be made for certain of the activities enumerated in your letter. G. L. c. 132A, § 2D provides as follows:

"In the development and improvement of state parks, state forest recreation areas and state reservations, the commissioner is hereby authorized and empowered; (1) To acquire, plan, construct, maintain and operate public recreational facilities, including roads, areas for parking, picnicking and camping, provisions for swimming, wading, boating, outdoor games, winter sports, horseback riding, bicycling and hiking trails, nature study, rest areas, outlooks, comfort stations, food accommodations and such other facilities as the commissioner deems necessary and desirable and consistent with the policy of the commonwealth, as set forth in section two B.

(2) To impose and collect such charges and fees for the use of the lands, buildings, facilities and equipment enumerated in subdivision (1) as may be necessary to defray in so far as practicable the cost of such developments and improvements, including costs of maintenance and operation and bond amortization and interest and to revise said fees and charges from time to time."

The use of a plot of forest for a weekend of camping and hiking by the Boy Scouts—to refer to one example contained in your request—would clearly be for recreational purposes. Section 2D has authorized you to acquire land for such a purpose. And land that you have acquired and designated for this use may be used for this purpose, provided, however, that such use is consistent with the policy of preserving our natural resources. Were great damage to the forests and ponds to result from this activity, then such an activity would not conform to the overall public policy. With that qualification, therefore, it is my opinion that the use of the land proposed by the Boy Scouts is of the type that is permissible. Appropriate fees may be charged for such a use pursuant to G. L. c. 132A, § 2D.

The example cited above is perhaps an obvious case. But accepted principles of administrative law require that an agency should evaluate the situations presented it on the basis of its own expertise, and that it make appropriate decisions in conformity to the legislative policy and purpose. Within the guidelines of permissible and non-permissible uses as developed above and applied to an illustrative situation, there must be administrative determinations made by your Department. With the partial exception of that part of your request pertaining to the development of a ski area, a proper decision depends on a knowledge of conservation techniques and problems and how they can be accommodated to a recreational interest. It is the Department of Natural Resources which must—in the first instance—make a factual determination whether the farming of land, the extension of a drainage pipe, the activities of a youth association, etc., may be carried on consistently with the Commonwealth's policy of conservation and recreation. The standards discussed in this opinion may serve as guidelines for the Department; but the Department itself must—on the basis of its own expertise—find and evaluate the relevant facts of each case.

In reaching a judgment as to the use of a mountainside for a ski area there will, of course, have to be a determination on your part regarding the injurious effects, if any, to a natural resource. That a private investor

might incidentally profit from building and operating such an area would not necessarily preclude your granting a permit for such a development. See *Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co.*, 348 Mass. 538.

The Legislature may lawfully determine that it is in the public interest to enlist private capital for the construction and operation of facilities which will benefit the public interest. *Court Street Parking Co. v. Boston*, 336 Mass. 224, 230; *Lowell v. Boston*, 322 Mass. 709, 736. And within the broad powers conferred upon you by the General Court is the implied power to use private enterprise in order to carry on your duties. The development of a ski resort on land owned by the Department of Natural Resources might well represent the use of public property primarily for private profit. On the other hand, the Department could find that private profit was secondary and incidental to a public purpose. Once again, the initial factual determinations must be made by the Department in accordance with the statutory policy with regard to conservation and recreation.

Should the Department find that the Commonwealth's conservation and recreation policies will be furthered by the development of a ski resort in a given area, the question may well arise whether the Department may lease the property in question to the developer. It is my opinion that such a lease is not contemplated by the statutes governing the functioning of the Department of Natural Resources. Ordinarily, there must be specific legislative authorization for the leasing of publicly controlled property. See, for example, c. 474 of the Acts of 1946; c. 612 of the Acts of 1948. The Department does not have express authority to grant a lease in this situation. Although it might be argued that the right of the Department to permit the use of its land for certain purposes creates an implied power to lease, I am more inclined to believe that the power to lease public property is of such a nature that it requires specific statutory authority as a condition to its exercise. Accordingly, a decision by your Department to authorize a ski development should be implemented by means of a permit rather than by means of a lease.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Nothing contained in Chapter 362, Acts of 1952, appears to require the registration of state-owned barber shops. The scope of that enactment is clearly limited to the personal registration of the barbers or owners of barber shops who are employed by the Commonwealth.

MAY 9, 1966.

HON. JOHN P. HARRINGTON, *Superintendent, Holyoke Soldiers' Home*.

DEAR SUPERINTENDENT HARRINGTON:—You have requested my opinion with respect to the registration of a barber shop located in the Holyoke Soldiers' Home.

You state the following as facts:

"1. This agency was opened to accept domiciliary members and/or hospital patients in May, 1952. In the construction of the building, a barber shop was provided and furnished by the Commonwealth for the convenience of members and patients. Employees, visitors, and/or the general public are not allowed to avail themselves of the services of the barber.

"2. The barber here now is—and all of the barbers who have been here were—[a] licensed journeyman barber. The barber works on the wards and cares for the patients who cannot go to the barber shop. Ambulatory patients are encouraged to go to the barber shop for therapeutic benefits and convalescence.

"3. The barber shop is owned by the Commonwealth of Massachusetts and not by the barber. The barber receives his income from the patients whom he serves and does not pay any rental to the Commonwealth and is not an employee of the Commonwealth."

On these facts, you have specifically asked "whether this agency (the Holyoke Soldiers' Home) is still exempt from the provisions of c. 112, § 87S, of the General Laws, as amended in 1952."

The law of this Commonwealth regulating the operation of barber shops is contained in G. L. c. 112, §§ 87F-87S. With specific regard to the registration of barber shops, the law is set out in § 87H:

"... Before any registered barber opens a barber shop, or moves his barber shop to a new location, or operates a barber shop previously approved for a prior owner, he shall apply to the board for an inspection and approval thereof, and the board shall receive a fee of twenty-five dollars for each inspection, and, upon the approval of such barber shop, the board shall issue a certificate of registration for such barber shop, which shall without further fee be in force, unless sooner cancelled, suspended or revoked, until June thirtieth next following the date of its issuance. All certificates of registration for barber shops shall be renewed annually by filing applications therefor on forms supplied by the board and the payment of a fee of five dollars and such renewal shall, unless cancelled, suspended or revoked, be in full force and effect until June thirtieth of the year following its issuance. The board may suspend, revoke or refuse to renew a certificate of registration issued by it for a barber shop if it finds, after a hearing, notice of which shall be given to the owner or operator of such shop, that any of its rules and regulations have been violated in said shop, that persons not authorized to practice the occupation of barbering have been employed therein as barbers or apprentices, or that there has been a violation in said shop of any provision of sections eighty-seven F to eighty-seven R, inclusive."

Section 87S, which regulates the scope of the application of §§ 87F to 87R, provides in part as follows:

"Sections eighty-seven F to eighty-seven R, inclusive, shall apply to barbers and owners of barber shops *who are employed by the commonwealth.*" [Emphasis supplied.] (As amended by St. 1952, c. 362.)

Prior to the enactment of St. 1952, c. 362, it was the opinion of a former Attorney General that §§ 87F to 87S of c. 112 were not applicable to persons rendering barbering services to inmates and employees in state, county and municipal institutions located within the Commonwealth. (Op. Atty. Gen., February 20, 1941.) Consequently, neither the person rendering the services nor the shop itself had to be registered in accordance with the requirements of § 87H.

In 1952, the passage of c. 362 of the Acts of that year extended the scope of the application of §§ 87F to 87R to include barbers and owners of barber shops who are employed by the Commonwealth. Clearly, the intent of the Legislature was to bring all persons engaged in the barbers' profession within the control of the Board of Registration of Barbers. To that extent, St. 1952, c. 362 made obsolete the 1941 opinion of the Attorney General referred to above; after 1952, it was clear that persons employed by the Commonwealth who rendered barbering services to employees and inmates in state, county and municipal institutions would be required to comply with the registration procedures of §§ 87F to 87R.

The question which you have posed is whether the passage of c. 362 of the Acts of 1952 imposed upon the Commonwealth a requirement to register its barber shops in compliance with the provisions of c. 112, § 87H, apart from the registration of the barbers themselves. It is my opinion that the answer to this question is in the negative. Nothing contained in c. 362 would appear to require the registration of state-owned barber shops. The scope of that enactment is clearly limited to the personal registration of the barbers or owners of barber shops who are employed by the Commonwealth. There is no requirement that state-owned barber shops be registered. The Commonwealth should not be included by implication when there is absent a clear legislative mandate that one agency of the Commonwealth is to regulate another agency of the Commonwealth.

Consequently, it is my opinion that, while the passage of c. 362 of the Acts of 1952 imposed responsibility for personal registration upon barbers and owners of barber shops employed by the Commonwealth, that amendment does not require the registration of state-owned shops. Accordingly, the barber shop in the Holyoke Soldiers' Home, as it is owned by the Commonwealth, need not be registered pursuant to the requirements of c. 112, § 87H.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

G. L. c. 112, § 81A, does not establish the Board of Registration in Nursing as the appointing authority for the position of Supervisor of Nursing and Practical Nursing.

May 12, 1966.

HON. ELEANOR A. GAFFNEY, *Chairman, Board of Registration in Nursing.*

DEAR MISS GAFFNEY:—You have asked for my opinion concerning the position of Supervisor of Schools of Nursing and Practical Nursing within your agency. You ask whether that position is subject to the civil service provisions of c. 31 of the General Laws, and whether the Board of Registration in Nursing is the appointing authority.

It is my opinion that the position of Supervisor of Schools of Nursing and Practical Nursing must be filled in accordance with c. 31. This matter has been carefully considered in an opinion rendered by former Attorney General Clarence A. Barnes in 1945. (Attorney General's Report, 1945, p. 54.) That opinion states in part:

"Unless a place in the public service has been specifically or impliedly excluded by the Legislature from the control of the Civil Service Law and Rules, or is within some group of places which has been so specifically or impliedly excluded, it is within the sweep of these measures and is governed by them when, like the place under consideration, it falls within a classification established by the Civil Service Commission."

Wells v. Commissioner of Public Works, 253 Mass. 416, 419

Since the position at issue here does not fall within one of the excluded categories enumerated by § 5 of c. 31, and since there is no implied exclusion either in that section or in the remainder of the chapter, the Supervisor of Schools of Nursing and Practical Nursing must be selected in accordance with civil service provisions.

You inform me that, according to the job description issued by the Division of Personnel, one of the principal duties of the Supervisor of Schools of Nursing and Practical Nursing is to inspect such schools of nursing and practical nursing. In this connection, you have directed my attention to c. 112, § 81A, which requires the Board of Registration in Nursing to inspect nursing schools, and which provides further that:

"Said board may make inspections by any of its members or by an agent or agents designated by it for the purpose. . . ."

It is my opinion that the portion of c. 112, § 81A quoted above is not sufficient to authorize the Board of Registration in Nursing to appoint the Supervisor of Schools of Nursing and Practical Nursing. The Board is established by c. 13, § 13 and is authorized by § 14 of that chapter to appoint an executive secretary. In no other section of the General Laws is the Board authorized to appoint any other employee. The only appointing authority for any such employees is the Director of Registration. See *Op. Atty. Gen.*, March 9, 1956, p. 75. See also § 8 of c. 13, which states that:

"The division of registration shall be under the supervision of a director. . . ."

In addition, § 9 of that chapter states further that:

"The various boards of registration and examination hereafter mentioned in this chapter shall serve in the division of registration. . . ."

And § 1 of c. 112 states that:

"The director of registration shall supervise the work of the several boards of registration and examination included in the division of registration of the department of civil service and registration."

In other sections of the General Laws where a board of registration or examination is authorized to appoint employees, the General Court has always used such words as "appoint" or "employ," never such an imprecise term as "designate." It is therefore my opinion that § 81A of c. 112 does not establish the Board of Registration in Nursing as the appointing authority for the position of Supervisor of Nursing and Practical Nursing. The grant of the power to designate the agent or agents who will make inspections merely authorizes the Board to select for that duty some person or persons from among its employees and agents. The statute does not vest in the Board the authority to appoint an employee solely for that purpose.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Department of Public Works may exercise discretion to determine that information concerning the number of bidders on any particular project be kept secret until all bids are official.

MAY 12, 1966.

HON. FRANCIS W. SARGENT, *Commissioner of Public Works*.

DEAR COMMISSIONER SARGENT:—In a recent request for an opinion you ask in essence whether the Department of Public Works may withhold information concerning the number of bidders on any particular project until all the bids on such project are formally opened. You state that "engineers (presumably connected with the Department) thought that giving out such information might be injurious to the Department." You attach to your request a memorandum from the Deputy Chief Engineer for Highway Construction, who states:

"The opportunities that exist under these circumstances for possible collusion or bidding to the detriment of the public interest is quite obvious.

"Let us assume that the same two identical contractors find out that they are bidding on two separate projects. Unscrupulous contractors would have no hesitance in making an 'arrangement' whereby each of them would be the successful bidder on one of the two projects at prices based on a scheme whereby competition was eliminated between them.

Again let us assume that a contractor finds out ten minutes before bid opening time that he has no competition for a certain project. Based on this knowledge and succumbing to the frailty of human nature, the probability is that he will submit a proposal with inflated prices."

I assume that the "projects" to which the question relates are highway construction projects. Bids for such projects are governed by G. L. c. 81, § 8. I quote the relevant language of this section:

"The department, when about to construct a state highway, shall advertise in two or more newspapers published in each county in which the highway lies, and in three or more daily newspapers published in Boston, for sealed proposals for the construction of such highway, stating the time and place for opening such proposals, and reserving the right to reject any and all proposals. If a proposal is satisfactory, the department, with the approval of the governor and council, shall make a contract in writing on behalf of the commonwealth for such construction. After the proposals have been accepted or rejected they shall be kept by the department, and shall be open to public inspection for three years, and may then be destroyed by the department. . . ."

Obviously nothing in this statute requires the Department to release information on the number of bidders on any project. I do not know whether it is customary for the Department to keep a running tabulation of bidders on each highway project. In any event, such tabulations, if kept, are not public records within the meaning of G. L. c. 4, § 7, para. 26, since there is no law requiring the keeping of such records. *Allen v. Kidd*, 197 Mass. 256, 259. *Butchers Slaughtering and Melting Association v. Boston*, 214 Mass. 254, 258-259. *Fondi v. Boston Mut. Life Ins. Co.*, 224 Mass. 6, 8. *Canney v. Carrier*, 333 Mass. 382, 383. See *Lord v. Registrar of Motor Vehicles*, 347 Mass. 608, 611. In view of the injury to the Commonwealth which may result from the release of information on the number of bidders on a project, I see no reason why your Department may not exercise discretion to determine that such information is to be kept secret until all bids are official.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The grant of authority of c. 75B, § 1, M.G.L., as amended by c. 572 of the Acts of 1965, to the Trustees of Southeastern Massachusetts Technological Institute, of all powers customarily and traditionally exercised by governing bodies of higher educational institutions does not encompass the authority to take testimony under oath.

MAY 12, 1966.

HON. JOSEPH M. SOUZA, *Chairman, Board of Trustees, Southeastern Massachusetts Technological Institute.*

DEAR MR. SOUZA:—You have requested my opinion with regard to the authority of state college trustees to take testimony under oath. Specifically, you have asked "whether the Board of Trustees of Southeastern

Massachusetts Technological Institute, or any subcommittee thereof, has the authority and jurisdiction to take testimony under oath from members and/or subordinates."

The powers of the Trustees of Southeastern Massachusetts Technological Institute are set out generally in G. L. c. 75B, § 1, as amended by c. 572 of the Acts of 1965, which provides in part as follows:

"In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees shall . . . have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing bodies of institutions of higher learning."

The above-quoted section, providing for the authority, responsibility, powers and duties of the Board of Trustees, sets out two distinct categories of powers; first, those powers which have been specifically conferred by statute; and second, those powers which are customarily exercised by such a board. Accordingly, it must be determined whether the authority to take testimony under oath falls within either of these two categories of powers.

Regarding the first category of "specifically conferred" powers, the various sections of c. 75B contain no such grant with respect to the taking of testimony under oath. Consequently, in the absence of specific statutory authority, the existence of such a power must depend upon its being one "customarily and traditionally exercised" by such a board.

A review of similar boards in other educational institutions indicates that the power to take testimony under oath is not one customarily or traditionally exercised by such bodies. The disposition and management of the affairs entrusted to such boards of trustees are not generally of such a nature as to warrant the exercise of such authority. The management of an educational institution has not generally required the authority to take sworn testimony, and consequently it cannot reasonably be implied on the basis of its being either customary or traditional. On the contrary, the power to take testimony under oath is of such consequence that its existence in any governmental agency ordinarily requires specific statutory confirmation.

Accordingly, there being no basis upon which to distinguish the situation of the Board of Trustees of Southeastern Massachusetts Technological Institute, or any subcommittee thereof, from that of similar boards at other educational institutions, it is my opinion that the grant of authority of c. 75B, § 1 of all powers customarily and traditionally exercised by governing bodies of higher educational institutions does not encompass the authority to take testimony under oath.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

The receipt of federal grants for educational purposes may be approved by a given school committee; but nothing in c. 44, § 53A indicates that such grants may be applied for or used on a cooperative basis by two or more school committees.

MAY 12, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education.*

DEAR COMMISSIONER KIERNAN:—You have requested an opinion regarding the proposed joining of two or more school committees for the purpose of application for and enjoyment of the benefits of Public Law 89-10, the so-called Elementary and Secondary Education Act of 1965. Your specific questions follow:

“(1) May two or more school committees join together under Massachusetts law and submit a joint program for participating in Title I or Title III of the Federal act with the committees specifying which town or towns are to hold title to the property and how the program is to be administered?”

“(2) May two or more school committees join under Massachusetts law in order to participate in Title I and Title III of the Federal act by one school committee making application for Federal funds in its own name and entering into an agreement with the other school committees to participate in the benefits of said program?”

You have indicated that it may well be desirable for school committees to cooperate to facilitate effective programs under the Federal statute. You further state that if any legal impediment to such cooperation exists, legislation designed to remedy the problem should be proposed.

The public school system in Massachusetts is operated on a local basis by individual school committees. With certain exceptions (see, for example, G. L. c. 71, § 16A), the Legislature has determined that there shall be a committee in charge of the public schools for each of the Commonwealth's cities and towns. These committees have specific statutory powers and duties. See G. L. c. 71, § 37.

Statutory authority clearly exists for the acceptance of federal grants for educational purposes. General Laws c. 44, § 53A provides in part as follows:

“An officer or department of any city or town . . . may accept grants or gifts of funds from the federal government . . . , and in the case of any grant or gift given for educational purposes may expend said funds for the purposes of such grant or gift with the approval of the school committee”

Thus, the receipt of federal grants for educational purposes may be approved by a given school committee; but nothing in c. 44, § 53A indicates that such grants may be applied for or used on a cooperative basis.

Ordinarily, where school committees have been empowered to act jointly, the General Court has made specific provision to such effect. You cite a number of examples of such authorization in your request, including G. L. c. 71, § 38D (joinder for the purpose of employment of a

Director of Occupational Guidance and Placement); G. L. c. 71, § 46 (joinder in the instruction of mentally retarded children); and G. L. c. 71, § 46G (joinder for the purpose of appointment of a school adjustment counsellor). No statutory provision exists which authorizes the type of joint action by school committees referred to in your letter. Considering the careful provisions enacted by the Legislature with regard to other cooperative efforts by local school committees, I can only conclude that the lack of specific statutory authorization indicates that the General Court has not—to this time—contemplated the kind of joint action in question.

Accordingly, I answer both your questions in the negative. This would—as you suggest—appear to be an area which is especially appropriate for remedial legislation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Board of Library Commissioners continues to exist pursuant to G. L. c. 15, § 9, and to perform all the various functions and duties assigned to it by G. L. c. 78, § 14, et. seq.

MAY 13, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—Your recent request for an opinion contains the following paragraph:

“In your opinion of March 9, 1966 it was held by you that ‘. . . despite the failure of the Legislature to repeal G. L. c. 15, §§ 9, 13 and 15A, the divisions to which these sections refer must go out of existence with the reorganization of the Department of Education pursuant to St. 1965, c. 572.’ Since the Division of Library Extension has gone out of existence, if the Board of Education under Chapter 572 of the Acts of 1965 establishes what was formerly known as the Division of Library Extension as a ‘bureau’, will the Board of Library Commissioners as named in Chapter 15, Section 9 of the General Laws continue to operate the Bureau under the over-all direction of the Board of Education?”

In my opinion of March 9, 1966, I said that the Division of Library Extension (see G. L. c. 15, § 9, as amended by St. 1960, c. 429, § 2) ceased to exist upon reorganization of the Department of Education by virtue of the provisions of G. L. c. 15, § 1F (as added by St. 1965, c. 572, § 2). However, I did not say, nor did I mean to imply, that the Board of Library Commissioners went out of existence with the Division. Section 9 of G. L. c. 15, states (in part):

“The division of library extension shall operate under the direction of the board of library commissioners and subject to the supervision and control of the board of education. The board of library commissioners

shall consist of five persons, residents of the commonwealth, one of whom shall be annually appointed by the governor. . . .”

This language does not make the Division of Library Extension synonymous with the Board of Library Commissioners. The latter board continues to exist pursuant to G. L. c. 15, § 9, and to perform all the various functions and duties assigned to it by G. L. c. 78, § 14, *et seq.* In view of the continuing existence and authority of this board, it becomes unnecessary to consider whether the Commissioners may also be appointed as a “bureau” within the Department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

A swimming pool falls within the statutory definition of “structure”, (G. L. c. 143, § 1) and accordingly the right of the Board of Standards to regulate the same must be determined in accordance with the provisions of §§ 3 and 3J of c. 143. Such authority to regulate the construction and safety of such pools is presently limited to providing regulations at the request of certain cities, towns or districts under said section.

MAY 13, 1966.

HON. GEORGE W. WATERS, *Chairman, Board of Standards, Department of Public Safety.*

DEAR MR. WATERS:—You have requested my opinion on the question “whether the Board [of Standards] has jurisdiction to promulgate regulations as to the construction and safety [of] swimming pools, inasmuch as Chapter 143, G. L. does not specifically make reference to swimming pools.”

The authority of the Board of Standards with regard to the regulation of buildings and structures is contained in G. L. c. 143, §§ 3 and 3J. As a prerequisite, however, to the application of either or both of those sections to the question raised, it must first be determined whether a swimming pool is a “structure.”

Chapter 143, § 1 defines “structure” as follows:

“‘Structure’, a combination of materials assembled at a fixed location to give support or shelter, such as a building, framework, retaining wall, tent, reviewing stand, platform, bin, fence, sign, flagpole, mast for radio antenna or the like. The word ‘structure’ shall be construed, where the context allows, as though followed by the words ‘or part or parts thereof’.”

It is clear from the above language that the Legislature has in fact intended that the word “structure” be given a liberal construction. The choice of a flagpole, a fence, or a sign as examples of a “structure” confirms the necessity for construing the term “structure” as broadly as possible. Consequently, in view of such intent and considering the examples given, it appears that a swimming pool does fall within the

statutory definition of "structure," and that accordingly the right of the Board to regulate the same must be determined in accordance with the provisions of §§ 3 and 3J of c. 143.

General Laws c. 143, § 3 provides in part as follows:

"Any city, town or district subject to this section may petition the board of standards to *propose regulations* relative to the construction, alteration and maintenance of buildings and other structures in such city, town or district, as the case may be; provided, that such petition shall have been authorized, in such a city by vote of its city council, or in such a town by vote of the town, or in such a district by vote of its district committee." [Emphasis supplied.]

Under the language of this section, it is clear that the Board may, upon petition of the cities, towns or districts subject thereto, *propose* regulations. As such, the authority of the Board to regulate structures under this section is quite limited. The Board does not have the authority to promulgate regulations on its own motion; it must be requested to do so by an appropriate municipality or district. In addition, such regulations may be rejected by the community which requested them. It is my opinion, therefore, that the authority of the Board to regulate the construction and safety of swimming pools under c. 143, § 3 is quite narrowly limited—as described above—by the express language of that section.

General Laws c. 143, § 3J is also relevant to the regulatory authority of the Board. That section provides in part as follows:

"The board of standards shall make and, from time to time, may amend, alter or repeal, regulations setting forth alternatives to the materials and to the type or method of construction, specified in the requirements contained or to be contained in any ordinance, by-law, rule or regulation, or in any special law applicable to a particular city or town, relating to the construction, reconstruction, alteration, repair, demolition, removal, use or occupancy, and to the standards of materials to be used in such construction, reconstruction, alteration, repair, demolition, removal, use or occupancy, *of buildings or other structures used for dwelling purposes* in any city or town, or in a district referred to in section three. . . ." [Emphasis supplied.]

While the language of this section does grant the Board authority to regulate certain buildings and other structures, that grant of authority is also somewhat limited. The language of § 3J limits the Board's regulatory power to "buildings or other structures used for dwelling purposes. . . ." Clearly, a swimming pool does not conform to the definition of "building" provided by c. 143, § 1. And giving the words "dwelling purposes" their normal meaning, it cannot reasonably be argued that a swimming pool is a "structure used for dwelling purposes." Consequently, it is my opinion that § 3J, which gives to the Board the right to regulate "buildings or other structures used for dwelling purposes," cannot be construed to authorize the regulation of swimming pools.

In light of the above, I conclude that the authority of the Board of

Standards to regulate the construction and safety of swimming pools is presently limited to providing proposed regulations at the request of certain cities, towns or districts under c. 143, § 3.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Chapter 846 of the Acts of 1963 cannot be read so as to include any conditions upon a widow's right to receive an annuity other than those expressed in the plain words of that section. The remarriage of a widow who is receiving an annuity pursuant to St. 1963 c. 846 does not terminate her right to receive benefits thereunder.

MAY 13, 1966.

HON. ROBERT Q. CRANE, *Chairman, State Board of Retirement*.

DEAR SIR:—In a recent request for an opinion, you asked whether the widow of a deceased former member of the uniformed branch of the Massachusetts State Police is entitled, after remarriage, to continue to receive an annuity awarded under c. 846 of the Acts of 1963.

Chapter 846 of the Acts of 1963 provides in part as follows:

“For the purpose of promoting the public good, and in consideration of long and meritorious service of any member of the uniformed branch of the state police who has been retired for reasons of superannuation or for reasons of disability after having completed at least twenty years of service, and who at the time of his retirement did not have the right to elect to receive a lesser retirement allowance so as to provide a survivor allowance for his widow, the state board of retirement shall pay to the surviving widow of such member an annuity amounting to fifteen hundred dollars; provided that such widow is not receiving a retirement allowance or pension under the provisions of any general or special law.”

Analysis of this section reveals that it contains two sets of conditions which operate at two different times. The first group refers to the State Police member while still alive; the second set qualifies the right of the widow to receive the annuity. For purposes of this opinion, it is assumed that all of the conditions expressed in c. 846 have been met. Therefore, the State Board of Retirement is compelled to pay a \$1,500 annuity to the widow.

The question which you have presented is one of statutory construction. Since there is no expressed indication that remarriage of a widow terminates the annuity, it must be determined whether such an alternative can be implied from the phraseology of St. 1963, c. 846.

It is my opinion that it cannot. Massachusetts statutes contain many instances of termination of a survivorship allowance upon the remarriage of a widow. See G. L. c. 32, §§ 9(2)(a), 12B, 85J (Option B), 88, 89, 89A, 89B, 89C, 95 and 95A. However, merely because statutes in an area similar to that of c. 846 of the Acts of 1963 provide for a contingency which is omitted in c. 846, it cannot be concluded that such provisions

are implicit in c. 846 itself. Basic principles of statutory construction govern this case.

" . . . no intent can be read into a statute which is not there either in plain words or by fair implication. There are no means of ascertaining the purpose and effect of a statute except from the words used when given their common and approved meaning. They are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment. But they cannot be stretched beyond their reasonable import to accomplish a result not expressed."

Emile F. Bergeron, Petitioner, 220 Mass. 472, 475.

In *Mitchell v. Mitchell*, 312 Mass. 154, the Court, in reviewing principles of statutory construction said, (p. 161) :

"If the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it by including the omitted case would be tantamount to adding to a statute a meaning not intended by the Legislature. . . ."

It is my opinion that c. 846 of the Acts of 1963 cannot be read so as to include any conditions upon the widow's right to receive the annuity other than those expressed in the plain words of that section. Accordingly, it is my opinion that the remarriage of a widow who is receiving an annuity pursuant to St. 1963, c. 846 does not terminate her right to receive benefits thereunder.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Cable Antenna Television services (CATV) is an extension of the interstate television broadcast whose signals CATV carries. Since Congress intended to occupy the field of television regulation in its entirety, and since community antennas are an adjunct in aid of television reception within the television broadcasting field, general state regulation of community antennas has been precluded by the Federal Communications Act. The general type of regulation and supervision contemplated by House Bill 238 is not within the authority of the Commonwealth.

MAY 25, 1966.

HON. WILLIAM C. MAIERS, *Clerk of the House*.

DEAR MR. MAIERS:—You have transmitted to me a copy of an order adopted by the House of Representatives on May 5, 1966, which relates to a proposed measure which would place cable antenna television services (commonly known as CATV) under the jurisdiction of the Department of Public Utilities. This order contains a request for the opinion of the Attorney General on the following question:

"Would House Bill 238, entitled 'An Act placing cable antenna television services under the jurisdiction of the department of public

utilities,' if passed, violate any provision of the Constitution of the Commonwealth or of the United States?"

The Act in question provides as follows:

"Chapter 159 of the General Laws is hereby amended by inserting after section 12 the following section:—

"*Section 12A.* The department shall have general supervision and regulation of, and jurisdiction over cable antenna television services, and shall after a hearing upon its own motion or upon complaint determine just and reasonable rates and charges to be charged for the service to be rendered."

I believe that a brief description of the nature of the cable antenna television services operation will be helpful.

By placing a master antenna at a selected point, usually one of great height, a CATV operator can capture the signals of regular television stations in nearby communities. The system amplifies the signals and, by means of cable, relays them to the homes of paying subscribers who ordinarily could not receive them from the originating stations. Thus it is apparent that CATV has both interstate and intrastate characteristics. Admittedly, the equipment used by any given CATV organization will be found entirely within the confines of a particular state, and that organization services subscribers within that state alone. A decision as to whether CATV does or does not operate within the channels of interstate commerce is not simple to arrive at, and—considering the fact that the concept of CATV is a recent one—there are few guidelines.

However, it is my opinion that CATV is an extension of the interstate television broadcast whose signals CATV carries. In *Lilly v. United States*, 234 F.2d 584, 587 (1956) the Court stated that a CATV system was "a mere adjunct of the television receiving sets with which it was connected." See also *Community Television Systems of Wyoming*, 17 Pike & Fischer, RR 2135, Wyoming District Court.

In exercising its power to regulate commerce among the states (see U. S. Const. Art. I, § 8), Congress assumed control of television regulation through the Federal Communications Act of 1934 (FCA). The Communications Act, taken as a whole, constitutes a broad grant of power to the Federal Communications Commission. The goal of the act is the regulation of interstate commerce in communications by wire and radio "to make available . . . to all the people of the United States a rapid, efficient, Nationwide . . . wire and radio communication service with adequate facilities. . . ." ¹ The act is to apply to "all interstate and foreign communication by wire or radio . . . and to all persons engaged in such communication. . . ." ² The United States Court of Appeals (Third

¹ 48 Stat. 1064 (1934), 47 U.S.C. § 151 (1964).

² 48 Stat. 1064 (1934), 47 U.S.C. § 152 (1964).

Circuit) in *Allen B. Dumont Laboratories Inc. v. Carroll*, 184 F.2d 153, 154, cert. denied, 340 U.S. 929, in construing certain sections of the Federal Communications Act has held that the states are precluded from any regulation of television because "the language [of the act] is so all inclusive as to leave no doubt that it was the intention of Congress to

occupy the television broadcasting field in its entirety." The Court in the *Dumont* case concluded its opinion by stating:

"We think it is clear that Congress has occupied fully the field of television regulation, and that the field is no longer open to the states, Congress possessing the constitutional authority to effect the result."

See also 79 *Harvard Law Review* 366, 373.

Therefore, it would appear that since Congress intended to occupy the field of television regulation in its entirety, and since community antennas are an adjunct in aid of television reception within the television broadcasting field, general state regulation of community antennas has been precluded by the Federal Communications Act. Thus, under the Federal Communications Act, the Federal Government has preempted the field to the exclusion of any regulation by individual states (with the exception of course of regulation of an incidental nature which would involve no burden upon interstate commerce). Therefore, given the broad scope of the Federal Act and the close relationship between CATV and regular television broadcasting, it is my opinion Massachusetts does not have the constitutional authority to impose general regulation upon CATV. Rather, the United States Congress must exercise regulatory jurisdiction over community antennas pursuant to legislative policies established by that body.

I do not mean to indicate that state or local authorities may not, as a matter of contract, for valid consideration such as a grant of permission to use municipal rights-of-way (see G. L. c. 166, § 25), impose reasonable conditions upon CATV operations which do not conflict with Federal policy. Likewise, municipalities may impose certain regulations of a particularly local nature, such as by-laws or ordinances governing the location of poles and cables.³ However, I advise you that the general

³ *Kroeger v. Stahl*, 240 F.2d 121 (zoning law that limits antenna height at particular location not an undue burden on interstate commerce).

type of regulation and supervision contemplated by House Bill 238 would not appear to be within the authority of the Commonwealth of Massachusetts.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

P.D. 12

The Department of Education, with the concurrence of Governor, is empowered to determine that attendance at the Warren Center for Emotionally Disturbed Children, Inc., during the summer months will benefit certain children who may or may not be attending institutions during the rest of the year pursuant to § 46I, c. 17, M.G.L.

MAY 26, 1966.

HON. ELLIOT L. RICHARDSON, *Lieutenant Governor of the Commonwealth.*

DEAR SIR:—In a recent request for an opinion, you state:

“Under the provisions of General Law Chapter 71, Section 46 (I) the Department of Education, upon request of the parents or guardians and with the approval of the Governor, may send emotionally disturbed children to any school, hospital, sanatorium or like institution within or without the Commonwealth. Certain institutions which presently qualify only run a ten-month program. The Warren Center for Emotionally Disturbed Children, Inc. operates the other two months of the year.”

In view of these facts, you ask the following question:

“Can an Institution affording remedial treatment for emotionally disturbed children the other two months of the year, that is during the summer months, qualify under Chapter 71, Section 46 (I) as ‘any school, hospital, sanatorium or like institution’ so that expenses may be borne by the Commonwealth?”

I quote the relevant part of G. L. c. 71, § 46I.

“The department may, upon the request of the parents or guardians and with the approval of the governor, send such emotionally disturbed children as it considers proper subjects for education to any school, hospital, sanatorium or like institution, within or without the commonwealth, affording remedial treatment for emotionally disturbed children for terms not exceeding twelve years, under regulations prescribed by the departments of education and mental health. . . .”

The obvious purpose of this statute is to enable emotionally disturbed children to reap whatever educational benefits they may derive from attending schools or other institutions that afford remedial treatment for their problems. When the Department of Education, with the concurrence of the Governor, finds that a child will benefit from attending a particular institution, it may, upon the request of the parents, send the child to that institution for *any* term up to twelve years. See 1965 Annual Survey of Massachusetts Law, § 20.27. The Department and the Governor may find that attendance at the Warren Center during the summer months will benefit certain children who may or may not be attending institutions during the rest of the year pursuant to § 46I. Such a decision is clearly permissible under the provisions of the statute.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

Salaries, wages or compensation paid by counties to persons in county service, whether for court expenses or other purposes, are subject to the requirements of St. 1966 c. 207.

JUNE 1, 1966.

EDWARD J. KELLEY, ESQ., *Administrative Assistant to the Chief Justice of the Superior Court.*

DEAR MR. KELLEY:—In a recent request for an opinion you call my attention to St. 1966, c. 207, which adds the following paragraphs to G. L. c. 35, § 19.

“No county treasurer shall pay any salary, wages or other compensation to any person in the service of a county unless the payroll, voucher or account is signed under the penalties of perjury by the officer in charge of the department, or the person immediately responsible for the appointment or employment of the persons named therein, or, in the absence or disability of such officer then by a person designated by him and approved by the county commissioners.

“Every such payroll shall contain at least the following information: the payroll period; the full name of each officer or employee; title of office or position held; rate of salary or wages or other compensation; and any portion of the payroll period for which salary, wages, or other compensation is being paid on account of sick leave, vacation or other leave.”

In view of this enactment and a similar enactment in St. 1965, c. 760, § 5, you ask in essence whether these new provisions of c. 35, § 19 apply to such “salaries, wages or other compensation to any person in the service of a county” as may be in the nature of court expenses. It is my opinion that these provisions are applicable.

I am aware that G. L. c. 213, § 8 confers power upon the Supreme Judicial and Superior Courts to “receive, examine and allow accounts for services and expenses incident to their sittings in the several counties and order payment thereof out of the respective county treasuries.” Assuming (but not deciding) that this statute is inconsistent with St. 1966, § 207, I am of opinion that the latter, being later in time, must prevail. *Sullivan v. Worcester*, 346 Mass. 570, 573. *Doherty v. Commissioner of Administration*, 1965 Mass. Adv. Sh. 1367, 1370. Indeed, G. L. c. 213, § 8 was held to have been implicitly repealed in so far as it authorizes the Superior Court to allow unapproved accounts for services which under G. L. c. 12, § 24 must now first be approved by district attorneys. *Rooney, Petitioner*, 298 Mass. 430, 434.

It is well known in this Commonwealth that a significant part of county expenditures are for court expenses. This fact notwithstanding, the Legislature omitted any exception for such expenses (*cf.* G. L. c. 35, § 11) in imposing the general audit and approval requirements of St. 1966, c. 207. “[T]he language of the statute is not to be . . . limited unless its object and plain meaning require it.” *Johnson’s Case*, 318 Mass. 741, 747. The apparent object of St. 1966, c. 207 is to ensure that persons are not paid by counties for services, except upon certification by

the officials enumerated therein; nothing in the "plain meaning" of the statute requires an exception for persons whose compensation may be deemed court expenses.

In your request, you directed my attention to the 1956 Report of the Attorney General, p. 85. I have examined that opinion, and do not believe that it affects my present conclusions.

I am of the opinion that any salaries, wages or compensation paid by counties to persons in county service, whether for court expenses or other purposes, are subject to the requirements of St. 1966, c. 207.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

Brief summaries with respect to four proposed constitutional amendments which are to appear on the ballot at the State elections of November 8, 1966;

- 1. providing that at state elections candidates for Governor and Lieutenant-Governor shall be grouped on the official ballot according to the party that they represent;*
- 2. providing that the Governor may from time to time prepare reorganization plans to be presented to the General Court, which, if not disapproved within sixty days, shall have the force of law;*
- 3. authorizing the Commonwealth and the cities and towns therein to provide for municipal industrial development in such manner as the General Court may determine;*
- 4. conferring considerable authority upon cities and towns with respect to the conduct of municipal government, including the authority to adopt, repeal and amend city and town charters and, in accordance therewith, local ordinances and by-laws.*

JUNE 1, 1966.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR MR. WHITE:—In accordance with Articles 48 and 74 of the Amendments to the Constitution of the Commonwealth, and § 53 of c. 54 of the General Laws, I have prepared the following summaries and brief statements with respect to the four proposed constitutional amendments which are to appear on the ballot at the State election of November 8, 1966.

SUMMARY.

The proposed amendment provides that at state elections candidates for Governor and Lieutenant-Governor shall be grouped on the official ballot according to the party that they represent and that it shall not be possible to vote for Governor and Lieutenant-Governor except as a partisan group.

BRIEF STATEMENT OF PROVISIONS
PREPARED BY THE ATTORNEY GENERAL.

The amendment would require that the Governor and Lieutenant-Governor chosen at any state election represent the same political party. The names of each party's candidates for Governor and Lieutenant-Governor will continue to appear on the ballot but will be grouped together, and it will be impossible to vote for a party's candidate for one office (Governor or Lieutenant-Governor) without voting for the same party's candidate for the other office.

SUMMARY.

The proposed amendment provides that the Governor, for the purpose of making certain structural changes in the executive department, may from time to time prepare reorganization plans to be presented to the General Court. If the General Court fails to disapprove a reorganization plan within sixty days of its presentation and has not prorogued by the end of such sixty days, the plan at that time shall have the force of law.

BRIEF STATEMENT OF PROVISIONS
PREPARED BY THE ATTORNEY GENERAL.

The amendment would annul Article 66 of the Articles of Amendment to the Constitution of the Commonwealth and would provide that the Governor, for the purpose of transferring, abolishing, consolidating or coordinating any agency in the executive department or the functions of any such agency or for the purpose of authorizing any officer of any such agency to delegate any of his functions, may at any time prepare one or more numerically identified reorganization plans to be presented to the General Court. There is no limit upon the number of plans which may be submitted by the Governor, and each such plan is subject to the provisions described below—including that provision which directs that the plan shall take effect if not approved within sixty days. Each such plan would be referred to a committee selected by the clerks of the two houses with the approval of the Speaker of the House and the President of the Senate. The committee selected must hold a hearing on each plan within thirty days of referral and must report, within ten days after hearing, that it approves or disapproves such plan. If the General Court fails to disapprove a plan within sixty days of presentation and has not prorogued at the end of such sixty days, the plan at that time will have the force of law. The General Court may not amend any such plan until sixty days after its presentation, but may require that such plans comply with provisions which the General Court may prescribe regarding certain rights of employees affected thereby. A plan may provide that it shall take effect on any date after sixty days from its presentation.

SUMMARY.

The proposed amendment authorizes the Commonwealth and the cities and towns therein to provide for municipal industrial development in such manner as the General Court may determine.

BRIEF STATEMENT OF PROVISIONS
PREPARED BY THE ATTORNEY GENERAL.

Under the proposed amendment the industrial development of cities and towns would be declared to be a public function for which the Commonwealth, as well as its cities and towns, may provide in such manner as the General Court may determine.

SUMMARY.

The proposed amendment confers considerable authority upon cities and towns with respect to the conduct of municipal government, including the authority to adopt, repeal and amend city and town charters and, in accordance therewith, local ordinances and by-laws. The General Court retains general power to act in relation to cities and towns and classes thereof and, in some circumstances, to enact special laws regarding a particular municipality, including laws for its incorporation, dissolution or merger. Cities and towns are not empowered to act with respect to general elections, taxation, pledges of credit, dispositions of park land, general civil relationships, the punishment of felonies, or the imposition of imprisonment except as the General Court may lawfully confer such powers upon them.

BRIEF STATEMENT OF PROVISIONS
PREPARED BY THE ATTORNEY GENERAL.

The proposed amendment annuls Art. 2 of the Articles of Amendment as amended by Art. 70 thereof. The power to adopt a city form of government is limited to towns of twelve thousand or more people, and the power to adopt a representative town meeting form of government is limited to towns of six thousand or more. At least fifteen per cent of the legal voters in any town or city may petition at any time for adoption or revision of a municipal charter. Within thirty days of the receipt of such a petition, the local legislative body (*e.g.*, the board of selectmen, the city council) shall provide for the election of a charter commission and, in municipalities which have never adopted a charter pursuant to this amendment, a referendum on whether a charter commission shall be elected. A validly elected charter commission must submit a revised or new charter to the local legislative body within ten months after its election, and the legislative body must then publish the charter and provide for its submission to the voters at the next city or town election at least two months after the submission by the charter commission. If, at this election, the charter is ratified by a majority of the voters, it becomes effective upon the date fixed therein. A charter may also be amended upon the proposal of two-thirds of the local legislative body and ratification of such proposal by the mayor (in cities which have a mayor), and such proposal shall then be submitted to the voters in the same manner as a charter or revised charter prepared by a charter commission. Any change in the election or appointment of the local legislative body, chief executive or manager must be deemed a revision, and not merely an amendment of the charter. City and town charters shall be recorded with the Secretary of the Commonwealth and deposited in the municipal archives and shall be judicially noticed.

Within the limits of its charter, the General Laws and the Constitution, a city or town may adopt, amend or repeal local ordinances or by-laws. But no city or town, without the lawful permission of the General Court, may regulate elections (except those for the purpose of considering the election of a charter commission, electing a charter commission or ratifying a charter or revisions and amendments thereto); levy, assess or collect taxes; borrow money or pledge its credit; dispose of park land; enact laws governing civil relationships; or define or punish felonies or impose imprisonment as punishment for the violation of any law. The General Court retains general power to act in relation to cities and towns and, on petition of the voters or the local legislative body and the mayor (in cities having a mayor), or on the recommendation of the Governor, to enact special laws regarding a particular municipality; such laws, enacted upon the recommendation of the Governor, require a two-thirds vote of each branch. The General Court also has power to establish metropolitan or regional entities embracing two or more municipalities and to incorporate, dissolve, merge or consolidate towns and cities and alter their boundaries. The General Court may also provide optional forms of municipal government to be adopted or abandoned by the voters. All special laws relating to individual municipalities and adopted prior to this amendment remain in effect unless repealed or amended by the General Court or by a municipal charter adopted under the provisions outlined herein.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The State Fire Marshal has jurisdiction over appeal of a matter which presents a direct question of fire or explosion hazard.

JUNE 2, 1966.

HON. LEO L. LAUGHLIN, *Commissioner of Public Safety*.

DEAR SIR:—You have requested my opinion regarding the jurisdiction of the State Fire Marshal to hear a certain appeal.

Your letter states that the licensing authority of the Town of Pembroke has voted to require that Henrich Enterprises, Inc. (Henrich), an applicant seeking to build a car wash, must obtain a gasoline storage permit. That applicant has appealed to the State Fire Marshal and, as a result, you ask whether the State Fire Marshal has jurisdiction to hear the appeal in question.

The State Fire Marshal may entertain appeals only pursuant to G. L. c. 148, § 31, which I quote in part:

“Any person aggrieved by any act, rule, order or decision of the head of a fire department, or other person or persons acting or purporting to act under authority derived from this chapter . . . may appeal to the marshal who shall make all necessary and proper orders thereon, but only in so far as the appeal presents a direct question of fire or explosion hazard. . . .”

Whether the Marshal has jurisdiction over Henrich's appeal depends on whether that appeal "presents a direct question of fire or explosion hazard." *Selectmen of Saugus v. Mathey*, 305 Mass. 184, 185. This is a matter which cannot be determined without resort to the record of the proceedings before the local licensing authority. See *Selectmen of Saugus v. Mathey*, *supra*; VIII Op. Atty. Gen. 132. The decision should be made in the first instance by the administrative official involved, in this case the State Fire Marshal.

In these circumstances, I am of the opinion that the State Fire Marshal should hear the appeal; if it should turn out that no question of fire or explosion hazard was raised by or before the licensing authority and that no such question is raised by the appeal, the appeal would raise no questions within the Marshal's administrative competence and should be dismissed. See *Norwood Heights Imp. Assn. v. City Council of Baltimore*, 198 Md. 1, 7-8. If such question was or is raised, it may be resolved by the Marshal. *N. V. Handel Industrie Transport Maatschappij v. State Fire Marshal*, 305 Mass. 482, 484.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A letter of credit, incorporating an unconditional pledge of the credit of the United States, which the government proposes to deposit with the state treasurer should not be considered in a different light from currency or other accepted obligation of the United States government.

JUNE 3, 1966.

MR. MALCOLM E. GRAF, *Director and Chief Engineer, Water Resources Commission*.

DEAR MR. GRAF:—In a recent request for an opinion you state that the Commission acts as "Contracting Officer for works of improvement for floodwater retarding structures." You also state, in essence, that the federal government pays part or all of the cost of these "works of improvement." Until the present time the federal government has, prior to the award of a construction project, deposited cash with the State Treasurer to cover the federal share of payment for that project. Now, however, apparently to establish the same procedure in Massachusetts as is followed in all of the other states, the federal government refuses to make cash payments prior to the award of a contract but, instead, is willing to deposit a letter of credit with the State Treasurer. You state:

"We have been informed by the Comptroller and the Budget Bureau that a letter of credit is unacceptable by virtue of the provisions of Chapter 29 of the General Laws. The State appropriation for the local cost of projects is insufficient to cover both Federal and State costs."

In view of the position taken by the Comptroller and the Budget Bureau, you ask:

"Can the Commonwealth accept a Federal Letter of Credit in lieu of cash and enter into contracts to continue building these projects and be in conformity with the provisions of Chapter 29 of the General Laws?"

Presumably, the objections of the Comptroller are based on G. L. c. 29, § 29, which states in relevant part:

"The Comptroller shall refuse to permit a disbursement or the incurring of an obligation if funds or allotments of funds under an appropriation account or subsidiary account under an appropriation account, sufficient to cover such disbursement or obligation are not available and shall immediately give notice of such refusal to the budget director and the department, office, commission or institution proposing the expenditure."

I assume, but do not decide, that funds from the federal government to pay for the federal share of various construction projects may properly be deposited in "appropriation" or "subsidiary" accounts (as these terms are used in G. L. c. 29) and that under G. L. c. 29, § 29 the Comptroller may refuse to permit a disbursement of funds to be reimbursed by the federal government, unless such funds are presently available. But even making this assumption, I am of the opinion that a federal letter of credit, if irrevocable (see G. L. c. 106, § 5-103(1) (a)), should be treated no differently from a deposit of cash by the federal government.

"A letter of credit is a well known instrumentality of commerce . . . [It] is an offer by a bank or other financial agency to be bound to the person to whom it is directed. . . ." *Moss v. Old Colony Trust Co.*, 246 Mass. 139, 151. See also G. L. c. 106, § 5-103 (1) (a), defining a letter of credit for purposes of the Uniform Commercial Code. Unless a letter of credit contains terms which make payment thereunder difficult or doubtful, it is a convenient form of guaranteeing payment for goods or services. See *Barney v. Newcomb*, 9 Cush. 46, 53-57; *Central Savings Bank v. Richards*, 109 Mass. 413, 414; *National Wholesale Grocery Co. v. Mann*, 251 Mass. 238, 244; Turner, *Letters of Credit as Negotiable Instruments*, 36 Yale L. J. 245.

However, a precise definition of "letters of credit" is difficult. The term has been used somewhat amorphously to describe many different types of contracts and instruments. See *Moss v. Old Colony Trust Co.*, *supra*; Uniform Commercial Code, Comments to G. L. c. 106, §§ 5-101, 5-102 and 5-103.

If the letter of credit which the government proposes to deposit with the Treasurer incorporates an unconditional pledge of the credit of the United States to the amount indicated therein, I see no reason why it should be treated differently from currency or other accepted obligations of the United States government.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The State Sanitary Code is applicable throughout the Commonwealth and is enforceable whatever the area or situation.

A school cafeteria falls within the definition of Food Service Establishment set forth in Article X, Regulation 1-1 of the State Sanitary Code, and is not exempt from the provisions of Article X of the Code.

JUNE 3, 1966.

HON. ALFRED L. FRECHETTE, M.D., *Commissioner of Public Health.*

DEAR DOCTOR FRECHETTE:—In a recent request for an opinion, you have inquired about the applicability of the State Sanitary Code to the operation of a school cafeteria. Your letter states that a superintendent of a school union in Western Massachusetts has refused to apply for a permit under § 32-2 of Article X of the State Sanitary Code, which Article concerns minimum operating standards for food service establishments.

In connection with this situation you have asked the following questions:

“1. Can the State Sanitary Code be enforced in a public school assuming the regulations adopted are reasonable and within the statutory authority granted by the legislature, or conversely, must a school cafeteria established by a school committee or like authority accept rules and regulations adopted by the Department of Public Health under the State Sanitary Code?

“2. If your answer to question one is in the affirmative, does a school cafeteria come within the definition of Food Service Establishment delineated in Article X, Regulation 1-1 of the State Sanitary Code.”

Articles I and X of the State Sanitary Code were adopted pursuant to authority given to the Department of Public Health by G. L. c. 111, § 5. Article I effective in 1960; Article X was filed in the office of the Secretary of State on December 28, 1964, and was effective throughout Massachusetts on January 1, 1965. Section 31.1 of Article X and § 1.1 of Article I of the State Sanitary Code both provide that the Code “. . . shall apply throughout the Commonwealth.”

Since the State Sanitary Code is applicable throughout the Commonwealth, I can only conclude that it is enforceable whatever the area or situation. Had the Legislature intended to exempt school committees or any other groups or individuals from the provisions of the Code, it would presumably have included specific provisions to such effect.

I am aware that the laws of this Commonwealth have vested great authority in local school committees with respect to the administration of the public schools. However, exemption from the State Sanitary Code would not appear to be a necessary incident to the authority and obligation to administer a local school system. Furthermore, nothing appears in c. 111, § 5 or in the State Sanitary Code itself which would indicate that a school committee has the right to accept or reject rules or regulations adopted by the Department of Public Health. Accordingly, absent some specific legislative provision exempting public schools from

the provisions of the Code, it is my opinion that the Code is applicable to the school union referred to in your letter.

In response to your second question, it is my opinion that a school cafeteria does fall within the definition of Food Service Establishment set forth in Article X, Regulation 1-1 of the State Sanitary Code. The definition in question reads as follows:

"Food Service Establishment means any fixed or mobile place, structure or vehicle whether permanent, transient, or temporary, including any restaurant, coffee shop, cafeteria, luncheonette, short-order cafe, grille, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, night club, roadside stand, industrial feeding establishment; private, public or non-profit organization or institution routinely serving the public; catering kitchen, commissary, or any other similar eating and drinking establishment or place in which food or drink is prepared for sale or for service on the premises or elsewhere, or where food is served or provided for the public with or without charge."

It is clear that the General Court intended to make this definition as broad as possible, and thus to include within the scope of the Code every conceivable type of public eating establishment. A "cafeteria" is specifically mentioned in the definition. Whether the phrase "routinely serving the public" would apply to a school cafeteria need not be decided; it is apparent that that phrase is applicable only to the words "private, public or non-profit organization or institution," and not to that part of the definition which precedes the semicolon.

The language of the regulation clearly supports the obvious intent of the Department of Public Health. I can see no reason why a school cafeteria should be considered exempt from the provisions of Article X of the State Sanitary Code.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The April 20, 1966, decision of the Board of Registration in Nursing to grant temporary licenses to foreign and out-of-state nurses cannot be effectuated under present Massachusetts Law.

JUNE 7, 1966.

HON. ELEANOR A. GAFFNEY, R.N., *Chairman, Board of Registration in Nursing*.

DEAR MISS GAFFNEY:—In a recent request for an opinion you state:

"At a regular meeting of the Board of Registration in Nursing on April 20, 1966 the members voted to grant temporary licensure to foreign and out of state nurses. This license is to be renewable yearly up to 3 years after which time all deficiencies could be made up and the candidate should have acquired permanent licensure by regular examination."

You now ask in essence whether the decision described in the above paragraph is permissible under the General Laws.

I call your attention to G. L. c. 112, § 74B, which I quote:

"The board shall examine an applicant for registration as a nurse or for licensing as a practical nurse who is an alien only if he presents to it a copy of his declaration of intention to become a citizen of the United States, certified by the clerk of the court in which it was filed, or a certificate from the Immigration and Naturalization Service of the United States, showing that, in accordance with law, he has declared his intention to become such citizen. In case the applicant is subsequently registered or licensed, unless, within five years following the filing of the copy or certificate hereinbefore referred to, he shall present to the board his completed naturalization papers showing that he is a citizen of the United States his certificate of registration shall be revoked and his registration cancelled, or his license shall be revoked and cancelled, as the case may be. The board may make pertinent inquiries of any and all applicants for re-registration or re-licensing for the purpose of determining the citizenship status of any nurse or practical nurse re-registered or re-licensed under any provision of this chapter."

In so far as the Legislature has provided a form of temporary licensure for aliens ("foreign nurses" as described in your letter), such licensure is for a period of no more than five years. There is also a requirement that, prior to registration, an alien applicant file with the Board a declaration of intention to become a citizen of the United States, and there is no provision exempting alien applicants from the usual examination requirements of G. L. c. 112, § 74, *et seq.* In these circumstances, the Legislature appears to have "occupied the field" with respect to the registration of aliens, and has left no room for administrative initiative to adopt a different, though not wholly inconsistent, scheme of registration. *State Bd. of Dispensing Opticians v. Carp*, 85 Ariz. 35, 39. *State ex rel. Rogers v. Louisiana State Bd. of Optometry*, 103 So. 2d 512, 515. (La. App.) Cooper. STATE ADMINISTRATIVE LAW, pp. 255-256. See *Cohen v. Board of Registration in Pharmacy*, 1966 Mass. Adv. Sh. 231, 237.

I also call your attention to G. L. c. 112, § 76, which states:

"The board may register or license in like manner, [as resident applicants are registered] without examination, any person who has been registered as a nurse or licensed as a practical nurse, as the case may be, in another state under laws which, in the opinion of the board, maintain standards substantially the same as those of this commonwealth for nurses or for practical nurses, as the case may be. The fee for registration or licensing without examination under this section shall be ten dollars."

Again, the plan to extend temporary licensure to out-of-state nurses is at least partially inconsistent with this statute, which provides that nurses from states which maintain standards comparable to those in this Commonwealth may be registered without examination in "like manner" as resident applicants; by implication, applicants registered in states whose standards of licensure are not as high as our own must pass an

examination and meet all conditions applicable to the licensure of residents.

Accordingly, I conclude that your decision of April 20, 1966 regarding temporary licensure cannot be effectuated under present Massachusetts law, and I answer your question in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The power of the Board of Registration of Real Estate Brokers and Salesmen is limited to the adoption of such rules or by-laws, not inconsistent with law, as it may deem necessary in the performance of its duties.

JUNE 7, 1966.

MR. JOHN J. EGAN, *Executive Secretary, Board of Registration of Real Estate Brokers and Salesmen*.

DEAR MR. EGAN:—In a recent request for an opinion the Board asks the following questions:

“1. Is the board empowered to pass a rule or regulation to require each applicant for a real estate broker’s license to state under pains and penalties of perjury that said applicant will act and hold himself out and carry on business in good faith as a real estate broker?”

“2. Is the board empowered to require applicants for real estate broker or salesmen licenses to devote any specified period of the working day to the operation of the real estate business?”

“3. May the board issue a nonresident license to an applicant who is not licensed as a real estate broker or salesman in his home state, if such applicant intends to maintain a place of business in Massachusetts? (Refer to Section 87WW last sentence of first paragraph.)

“4. May the board act to suspend or revoke the license of the designated officer of a corporation in addition to suspending or revoking the license of the corporation itself for a violation of section 87AAA which violation was committed by the corporation? (Refer to section 87UU.)

“5. Does the law require or permit a business trust to act as a real estate broker?”

“6. May the board issue a license to such trust under section 87UU or does section 87QQ or any other section preclude same?”

“7. Is the board empowered to enact a requirement by rule or regulation that all listings taken by real estate brokers be in writing?”

I shall consider the questions separately.

The power of the Board to adopt rules and regulations is limited to the adoption of “such rules or by-laws, not inconsistent with law, as it may deem necessary in the performance of its duties.” G. L. c. 13, § 56. (The Board also has an even more limited power under G. L. c. 112, § 87SS to

make rules and regulations for the conduct of examinations.) The General Court has been considerably more generous in the power that it has given to other administrative agencies to adopt regulations. See, e.g., G. L. c. 112, § 67 (Board of Registration in Optometry); G. L. c. 112, § 73F (Board of Registration of Dispensing Opticians); G. L. c. 112, § 87CC (Board of Registration of Hairdressers).

It is a well-known rule of law that regulations adopted by an administrative agency must be "within the ambit of the enabling statute." *Commonwealth v. Diaz*, 326 Mass. 525, 526-527, and cases cited. *North Reading v. Drinkwater*, 309 Mass. 200, 202. I am of the opinion that G. L. c. 13, § 56 does not confer authority upon the Board to adopt a regulation requiring candidates for brokers' licenses to "state under pains and penalties of perjury" that they will act in good faith as brokers. Requiring such an oath is not necessary to the performance of the Board's statutory duties. See *Commonwealth v. McFarlane*, 257 Mass. 530, 531; *Borggaard v. Department of Pub. Works*, 298 Mass. 417, 420; *North Reading v. Drinkwater*, *supra*. Cf. *Silverman v. Board of Registration in Optometry*, 344 Mass. 129, 131-132. I do not reach the questions of whether the oath that is outlined in the first question is sufficiently specific to be constitutionally enforceable (see *Eljbrandt v. Russell*, 86 S. Ct. 1238, 1241), or of whether the Board may deny licensure to a person who appears unwilling to "act and hold himself out and carry on business in good faith as a real estate broker." I answer the first question "No."

It is a fundamental proposition of our constitutional form of government that there may not be an irrational interference with the liberty to pursue a lawful business or profession. *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 498, fn. 8. *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 420-426. A corollary to this rule is that an administrative agency (or other subdivision of the Commonwealth) may not regulate the practice of a business or profession except to the extent provided by statute. *Greene v. Mayor of Fitchburg*, 219 Mass. 121, 125-127. *Commonwealth v. Diaz*, *supra*, 528. *Cohen v. Board of Registration in Pharmacy*, 1966 Mass. Adv. Sh. 231, 237. The provisions of G. L. c. 112, § 87AAA spell out in detail the causes for which the Board may suspend, revoke or refuse to renew a broker's or salesman's license. Failure to devote a specific period of the day to the operation of the real estate business is not such a cause. Likewise, G. L. c. 112, §§ 87SS, 87TT and 87XX set forth qualifications for persons desiring to be licensed as salesmen or brokers, but there is no requirement that such persons devote any specified period to the operation of the real estate business. In my opinion the Board is not empowered to establish the requirement set forth in the second question either by regulation or otherwise, and I answer that question "No."

I quote the first paragraph of G. L. c. 112, § 87WW.

"A non-resident may be licensed as a broker and a non-resident individual may be licensed as a salesman upon conforming to all pertinent provisions of sections eighty-seven PP to eighty-seven DDD, inclusive; provided, that the board may exempt from the written examination prescribed in section eighty-seven SS a broker or salesman

duly licensed in any other state of the United States under the laws of which a similar exemption is extended to licensed brokers and salesmen of the commonwealth. Such non-resident licensee shall not be required to maintain a usual place of business within the commonwealth; provided, that such non-resident broker shall maintain a usual place of business within such other state in which he is so licensed."

Nothing in the above statute requires applicants for non-resident brokers' licenses to be licensed in their "home states" or anywhere else. Under the last sentence of the above paragraph, a non-resident applicant licensed *and* practicing in any other state is not required to be licensed here. (I interpret the final proviso as applying only to the last sentence and not to the entire paragraph. See *Hopkins v. Hopkins*, 287 Mass. 542, 547, and cases cited.) By inference, all other non-resident applicants are required to maintain, or show intentions of maintaining, a usual place of business in this Commonwealth as a qualification for licensure. See *Zweigel v. Webster*, 32 F.Supp. 1015, 1018 (D.C. Okla.). With the above explanation, I answer your third question "Yes."

If the "designated officer" of a corporation licensed as a broker under G. L. c. 112, § 87UU is guilty of any act which, under G. L. c. 112, § 87AAA may result in revocation of a license, then his license, as well as that of the corporation, may be revoked. Of course, I cannot make an abstract determination as to when the guilt of the corporation may also be imputed to the officer or *vice versa*. Subject to these qualifications, the fourth question is answered "Yes."

I answer questions five and six together. The first paragraph of G. L. c. 112, § 87UU states:

"An application for a broker's license by a corporation, society, association or partnership shall designate at least one of its officers or partners as its representative for the purpose of obtaining its said license, and each such officer or partner so designated shall apply to the board for a broker's license in his own name at the same time unless he is already a licensed broker."

I assume that you use the term "business trust" as synonymous with the term "trust" in G. L. c. 182, § 1, *et seq.* If a trust may be regarded as a "corporation, society, association or partnership," it may be licensed as a broker. If it were not for a leading case on this subject, I would be inclined to rule that, for purposes of G. L. c. 112, § 87UU, a business trust is a type of association and may be licensed as a broker. See G. L. c. 182, § 1, defining trusts and associations almost identically. However, the Supreme Judicial Court has held that an association and a business trust are distinctly different types of business organizations. *Bouchard v. First People's Trust*, 253 Mass. 351, 355-362. *Larson v. Sylvester*, 282 Mass. 352, 358. It has also been held unequivocally that a business trust is not a partnership (*State Street Trust Co. v. Hall*, 311 Mass. 285, 311) and not a corporation (*Swartz v. Sher*, 344 Mass. 636, 639). It is not a "society," a term frequently used in New England to designate religious bodies (see *Bates v. Schillinger*, 128 Me. 14, 17; *Church & Congregational Soc. v. Hatch*, 48 N. H. 393, 396) or synonymously with

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"association" (*New York County Medical Assoc. v. New York*, 65 N. Y. S. 531. *Law v. Crist*, 41 Cal. App. 2d 862, 865).

It is not necessary to consider whether, absent a statute, a business trust may be an applicant for a broker's license under G. L. c. 112, § 87XX. The General Court having listed in both § 87UU and § 87XX the types of business organizations which may be licensed as brokers and having omitted "trusts" from this list, the omission may not be deemed accidental. *Bouchard v. First People's Trust*, *supra*, 62, and cases cited. I answer the fifth and sixth questions "No."

The seventh question raises issues which I have already discussed in answer to the first question. A regulation requiring listings to be in writing is not within the scope of the authority granted to the Board by the Legislature. I answer the seventh question "No."

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Board of Trustees of Lowell Technological Institute has authority to set the salary of the President of the Institute in accordance with the salary rates found in the professional salary schedule set forth in Chapter 30, § 46B, M.G.L. The salary rate voted by the Board on April 21, 1966, to take effect on April 4, 1966, may lawfully be paid to the President of Lowell Technological Institute.

JUNE 7, 1966.

HON. SAMUEL PINANSKI, *Chairman, Board of Trustees, Lowell Technological Institute.*

DEAR MR. PINANSKI:—You have requested my opinion with regard to the legality of certain actions taken by the Board of Trustees of Lowell Technological Institute at its meeting of April 21, 1966, at which it was voted to fix the salary of the President of the Institute. Specifically, you have asked:

"May the salary rate approved by the Board of Trustees at their meeting on April 21, 1966, to take effect on April 4, 1966, be paid to the President of Lowell Technological Institute?"

You have provided the following facts:

"In order to remove any questions as to the legality of the prior vote of the Board relative to the salary of the President, passed before Chapter 828 of the Acts of 1965 became effective, it was upon motion duly made and seconded, unanimously voted to ratify and confirm all Trustee actions taken at the meeting of January 20, 1966, and further, it was upon motion duly made and seconded VOTED that the salary of Martin J. Lydon, under his permanent appointment as president of Lowell Technological Institute as previously defined by other appropriate actions of the Board of Trustees, be established at the rate of \$23,300 in accordance with the provisions of said Chapter 828 of the Acts of 1965, effective as of April 4, 1966."

In your statement of facts you indicate that one action of the Board of Trustees on April 21, 1966, was the ratification of actions taken by the Trustees at their earlier meeting of January 20, 1966. This procedure of ratification and confirmation of prior acts, so far as it related to acts which were valid at the time of their original enactment, is a proper exercise of the Board's authority. However, the authority of the Board to ratify and confirm prior acts is inherently restricted to such earlier acts as were valid initially. Thus, the ratification and confirmation of an act which the Board originally had no authority to undertake would have no effect upon the validity of that act. The act, having been a nullity originally, cannot subsequently be validated by ratification.

Accordingly, it is my opinion that your vote of April 21, 1966, to ratify and confirm your earlier actions of January 20, 1966, was proper and effective only with respect to those earlier actions lawfully voted; your vote to ratify and confirm would have no effect upon those actions of January 20, 1966, which had not been legally taken.

In your statements of facts with respect to the meeting of April 21, 1966, you further state that a motion was duly made and seconded and that it was voted to establish the salary of the President of Lowell Technological Institute at \$23,300 in accordance with Chapter 828 of the Acts of 1965 which became effective on April 4, 1966.

Chapter 75A, § 12 as amended prior to the effective date of Chapter 828 provided in part as follows:

"The trustees shall elect the president . . . and shall define the duties and tenure of office in accordance with the appropriate laws of the commonwealth; . . . the president shall be paid a salary of eighteen thousand dollars, and shall devote his full time during business hours to the duties of his office.

* * * * *

"The classification, title, salary range within the general salary schedule, and descriptive job classifications for each position shall be determined by the trustees for each member of the professional staff and copies thereof shall be placed on file with the governor, budget director, director of personnel and standardization and with the joint committee on ways and means. . . ."

Chapter 828 of the Acts of 1965, however, added the following provision:

"The president shall devote his full time during business hours to the duties of his office and he shall be paid such salary as the board of trustees may approve; provided, however, that the said salary shall not exceed the salary rates in the professional salary schedule in section forty-six B of chapter thirty."

The express language of Chapter 75A, § 12 as amended by Chapter 828 of the Acts of 1965, effective April 4, 1966, gives the Board of Trustees the authority to set the salary of the President in accordance with the salary rates found in the professional salary schedule set forth in Chapter 30, § 46B. Consequently, the action of the Board on April 21, 1966, in voting to fix the salary of the President in accordance with

Chapter 828 of the Acts of 1965, was at that time within the authority of the Board.

Accordingly, I answer your question in the affirmative. The salary rate voted by the Board of Trustees on April 21, 1966, to take effect on April 4, 1966, may lawfully be paid to the President of Lowell Technological Institute.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

An appointed employee of the Department of Corporations and Taxation is subject to Chapter 633 of the Acts of 1962, the so-called Testimonial Dinner Law.

If ticket purchasers are aware that an Anniversary Dinner-Dance is to be a vehicle for honoring an appointed employee of the Department of Corporations and Taxation for his services, and if this is a reason why tickets are in fact purchased, the sale of such tickets would violate both the letter and the spirit of Chapter 633 of the Acts of 1962.

JUNE 8, 1966.

HON. GUY J. RIZZOTTO, *Commissioner of Corporations and Taxation*.

DEAR COMMISSIONER RIZZOTTO:—You have requested my opinion with respect to your status under the provisions of Chapter 633 of the Acts of 1962, the so-called Testimonial Dinner Law. You have indicated that the Medford Lodge, Order of Sons of Italy in America, of which you have been a long-time member and officer, is planning to hold its 41st Anniversary Dinner-Dance on Saturday, June 18, 1966. Apparently, the proceedings will include a presentation to you of the Lodge's annual "Man of the Year" award.

You further state: "The affair is not designed as a testimonial for me or anyone and the award is purely coincidental to the Anniversary party. Nevertheless, I am seeking your opinion as to whether or not I can accept said award in view of St. 1962, c. 633."

Chapter 633 of the Acts of 1962 provides as follows:

"No person shall sell, offer for sale, or accept payment for, tickets or admissions to, nor solicit or accept contributions for, a testimonial dinner or function, or any affair, by whatever name it may be called, having a purpose similar to that of a testimonial dinner or function, for any person, other than a person holding elective public office, whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the commonwealth or any political subdivision thereof.

Whoever violates any provision of this section shall be punished by a fine of not more than five hundred dollars." [Emphasis supplied.] It is clear that, as an appointed employee of the Department of Corporations and Taxation, you are subject to the provisions of this statute.

Whether the sale of tickets to the function planned by the Medford

Lodge will violate the provisions of the Testimonial Dinner Law depends upon facts which are not available to me. If ticket purchasers are aware that the Anniversary Dinner-Dance is to be a vehicle for honoring you for your services, and if this is a reason why tickets are in fact purchased, the sale of such tickets would violate both the letter and the spirit of Chapter 633 of the Acts of 1962. On the other hand, if tickets are purchased primarily because persons wish to attend an anniversary celebration, and the presentation of the award to you is merely an incidental part of the evening, it is my opinion that there would be no violation. Reference or lack of reference to you upon the ticket itself is at least one—although not the only—standard upon which this question may be judged.

Should there be a determination as to the specific character of the function and of the ticket sale, I would be pleased to render further advice upon this matter.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

A school committee may offer a part-time educational program whereby a student of a private school may attend certain classes in the public school. However, it cannot be compelled to do so.

The present statutory framework of the Commonwealth does not permit in-service training for teachers of non-public schools.

Pursuant to G. L. c. 71, § 38A, guidance counsellors paid by local funds may counsel students in non-public schools.

Neither state or local funds may be used for the installation or improvement of private elementary laboratories, shops, kitchens, and cafeterias, but there is no provision in the State Constitution which prohibits state and local officials from distributing federal funds for such purposes.

Library resources, textbooks, and other instructional materials cannot be loaned to non-public schools if such materials are purchased with municipal or state funds. If such materials are purchased with federal funds, there is no prohibition against such loaning.

JUNE 13, 1966.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR COMMISSIONER KIERNAN:—You have requested my opinion on several questions relative to the implementation of United States Public Law 89-10. Specifically, your letter, quoting language from §§ 203 and 205 of the Act, poses six questions:

“1. Does a student of a non-public (private or parochial) school living in the town have the right to attend a public school in the town on a part-time basis (dual enrollment), or is his right limited to attending a public school on a full time basis as in Chapter 76, section 5 of the General Laws?

"2. May a local school committee permit a student who lives in the town and attends a non-public school to attend certain classes in the public schools if proper arrangements can be made therefor?"

"3. Can a local school committee provide for in-service training for teachers of non-public schools either within the public school building itself, within the private school building, or at another appropriate location?"

"4. Can the local school committee authorize a public school guidance counsellor, remedial reading teacher, *et al.* to go into a non-public school and give the students the benefit of their services where these services are not provided in the non-public school?"

"5. Can public money be used for the installation or improvement of private elementary laboratories, shops, kitchens, and cafeteries?"

"6. Can library resources, textbooks, and other instructional materials be loaned to the non-public school and retained on a loan basis within said school, the title to which would remain in the public authority?"

I know of no statutory or constitutional provision applicable to this Commonwealth that either requires or prohibits a so-called "shared time" program, under which a student attends a public school for certain courses and a non-public (presumably, but not necessarily, sectarian) school for others. See *Zorach v. Clauston*, 343 U.S. 306; *Drinan, Religion, The Courts and Public Policy*, pp. 160-166. Even a commentator who strongly disagrees with the policy underlying such a program has conceded that it is constitutional. Pfeffer, "Second Thoughts on Shared Time," 79 *Christian Century* 779-780. Consequently, in response to your first two questions, it is my opinion that a school committee may offer a part-time educational program if it wishes, although, of course, it may not be compelled to do so.

Your third question poses—at least in the first instance—a statutory as well as a constitutional problem. A school committee, of course, derives its authority solely from the General Court and cannot function in any way inconsistent with the legislative grant of power. *Opinion of the Justices*, 332 Mass. 785, 787. *Kane v. School Committee of Woburn*, 317 Mass. 436, 438. *Sullivan v. School Committee of Revere*, 348 Mass. 162, 165. Furthermore, a school committee can exercise only those powers which have been expressly granted. *Wright & Ditson v. Boston*, 270 Mass. 338, 339. *Brine v. Cambridge*, 265 Mass. 452, 454-456. The general power of a school committee is to have "charge of all public schools" (G. L. c. 71, § 37); certain implied powers must necessarily flow from this broad delegation. But the authority to take action beyond what is necessary for the ordinary administration of the local public school system must be specifically granted by the General Court, and cannot simply be implied.

An examination of the statutes relating to school committees and to the administration of schools in general reveals no grant of authority for the conducting of a program of in-service training for private school teachers. A determination by a given school committee or even by the

Department of Education itself that such a program is desirable is not sufficient. Absent specific statutory authority, it is my opinion that such a project cannot be undertaken. In the light of this conclusion that the present Massachusetts statutory framework does not permit such a program, it would not be appropriate to consider the constitutional issue. A decision as to the constitutionality may well depend upon the type of statute eventually enacted, and upon the particular facts of each case. See *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203.

Your fourth question concerns the authority of a school committee to send guidance counsellors and certain other local school employees into private schools to give the benefit of their services to students in such schools. Again, the question raises both statutory and constitutional issues. I know of no statute which permits a school committee to provide the services of a remedial reading teacher (to use an example given in your question) to non-public schools. On the other hand, I call your attention to G. L. c. 71, § 38A, which I quote:

"The school committee of a town not in an occupational guidance and placement district may employ a director or directors of occupational guidance and placement, approved by the department prior to his or their appointment, and may fix his or their compensation, and a director employed under this section shall, under the direction and control of the supervisor of guidance and placement provided for in section six B of chapter fifteen, give his whole time to the occupational and employment problems of the young people between the ages of sixteen and twenty-three in said town. He shall use all means available to furnish occupational guidance and secure employment opportunities for such persons. Every such director may consult with and seek the advice of said supervisor, and shall make an annual report to the committee and forward a copy thereof to said supervisor."

This legislation clearly contemplates the employment of guidance counsellors who will give their services to all the young people in a community between the ages of 16 and 23. Indeed it is common knowledge, and I take notice of the fact, that persons between the ages of 18 and 23 are usually not enrolled in the public schools. If a guidance counsellor can do his job more efficiently by meeting in various private schools with persons whom he has been appointed to counsel, then, the authorities in charge of such schools consenting, there does not seem to be any reason why he should not meet with them there. The Fourteenth Amendment of the Federal Constitution apparently permits school committees to provide certain services to students in non-public schools, even when these are under sectarian control. See, for example, *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (furnishing of textbooks); *Everson v. Board of Education of Ewing Township, Pa.*, 330 U.S. 1 (provision for bus transportation); *Chance v. Mississippi State Textbook Board*, 190 Miss. 453; *Board of Education v. Wheat*, 174 Md. 314; *Nichols v. Henry*, 301 Ky. 434. I am of the opinion that the same power is open to the Commonwealth and its political subdivisions, the provisions of Section 2 of Article 46 of the Articles of Amendment to the Massachusetts Constitution notwithstanding. See *IX Op. Atty. Gen.* February 17, 1936.

Thus, in brief, my opinion is that pursuant to G. L. c. 71, § 38A guidance counsellors paid by local funds may counsel students in non-public schools. The authority to send other school employees to non-public schools must be derived from specific statutes. I cannot say abstractly whether such statutes, if enacted, would be constitutional. Constitutionality would, of course, depend upon the terms of the statutes enacted, and the specific factual situations to which such statutes were to be applied.

With regard to the fifth question, I call your attention to relevant parts of § 2 of Article 46 of the Articles of Amendment:

“All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendance of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendance of public officers or public agents authorized by the commonwealth or federal authority or both . . .”

On the basis of this Article, I conclude that insofar as “public money” refers to money appropriated by the Commonwealth or raised by taxation in local communities, such money may not be used for the purpose outlined in the fifth question.

There has been an opinion by an Attorney General that the provisions of Article 46, § 2 do not apply to federal funds distributed to the Commonwealth for a specific educational purpose. Attorney General's Report (1944) pp. 74-76. (See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537.) I agree with this opinion. I do not, however, comment on whether under the First Amendment to the Constitution of the United States federal money may be expended for construction projects at sectarian institutions. That is a question for interpretation by federal authorities. See *I Op. Atty. Gen.* 562. It is neither appropriate nor significant for a State Attorney General to pass upon the constitutionality of federal legislation.

Accordingly, I answer your fifth question by stating that neither state nor local funds may be used for the installations and improvements which you mention but that there is no provision in the State Constitution which prohibits state or local officials from distributing federal funds for such purposes.

In answer to the sixth question, insofar as that question concerns loans of certain educational materials to schools only and not to students, it is my opinion that if the materials are purchased with funds of a

municipality or funds of the Commonwealth, they may not be loaned to private institutions. Section 2 of Article 46, quoted earlier in this opinion, forbids the "use of public . . . property . . . for the purpose of . . . aiding . . . any school which is not publicly owned." For the reasons given in my answer to the fifth question, I see nothing in the State Constitution which prohibits the local or state officials from lending such materials to a private institution when they are purchased with federal funds. Again, I consider it inappropriate for me to decide whether the First Amendment to the Constitution of the United States permits the loan of federally purchased materials to private sectarian institutions.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The determination as to whether aerial passenger tramways are to be regulated as elevators involves mechanical as well as legal considerations and should be made by the Board of Elevator Regulations in the first instance.

The Division of Inspection, Department of Public Safety, or the Board of Elevator Regulations does not have the authority to provide rules and regulations for the inspection and testing of aerial passenger tramways of all kinds used for ski tows and other purposes.

JUNE 20, 1966.

HON. LEO L. LAUGHLIN, *Commissioner of Public Safety*.

DEAR COMMISSIONER LAUGHLIN:—A recent request for an opinion (to which was attached the American Standard Safety Code for Aerial Passenger Tramways) contains the following statements:

"The Board of Elevator Regulations has been informed of the desire of the Governor of the Commonwealth to provide for the inspection and testing of aerial passenger tramways of all kinds used for ski tows and other purposes.

"The Board of Elevator Regulations is of the opinion that Chapter 143 as presently drafted does not vest in the Department of Public Safety or the Board of Elevator Regulations jurisdiction over 'Aerial Tramways.'

* * *

"Your opinion would be appreciated as to whether under General Laws, Chapter 143, does the Division of Inspection, Department of Public Safety or the Board of Elevator Regulations have the authority to provide rules and regulations for the inspection and testing of aerial passenger tramways of all kinds used for ski tows and other purposes."

I quote G. L. c. 143, § 68, which states the jurisdiction of the Board of Elevator Regulations.

"The board of elevator regulations shall frame amendments to the regulations relating to the *construction, installation, alteration and*

operation of all elevators, and relative to the location, design and construction of shafts or enclosures for elevators, safety devices, gates and other safeguards, protection against the elevator or hoisting machinery, and means to prevent the spread of fire, and also amendments to the regulations designed to make uniform the work of the inspectors of the division of inspection of the department and of inspectors of buildings throughout the Commonwealth." [Emphasis supplied.]

Obviously, the statute which confers jurisdiction upon the Board of Elevator Regulations does not specifically refer to ski tows or to other types of aerial passenger tramways. The statute could perhaps be interpreted to uphold the Board's jurisdiction or to deny it. There are no Massachusetts cases which are applicable, and apparently none from other states. The determination as to whether such tramways are to be regulated as elevators involves mechanical as well as legal considerations, and should probably be made by the Board in the first instance.

The present statutory treatment is such that—for all practical purposes—amendments by the General Court are necessary to decide the issue with finality. Absent such amendments, however, it is my opinion that the statute as written does not confer the jurisdiction in question upon the Board of Elevator Regulations. Section 68 of c. 143 refers specifically to elevators, as well as to elevator shafts, enclosures, safety devices, gates and hoisting machinery. Words which appear in a statute must ordinarily be given their plain and usual meaning. In the present case, it is clear that the Legislature has provided for the type of lifting or hoisting device which is familiarly known as an elevator. Aerial passenger tramways, whether used as ski tows or for other purposes, are not commonly called elevators, and I have no reason to believe that the General Court thought of them as such when enacting the provisions of G. L. c. 143, § 68.

The very nature of aerial passenger tramways creates possible danger to those who use them if such tramways are not properly constructed and maintained; governmental regulation of such devices may, therefore, well be desirable. However, authority for such regulation cannot be supplied by an opinion of the Attorney General. General Laws c. 143, § 68 does not supply the authority in its present form. Nor do other sections of c. 143 vest such powers in other boards or divisions within the Department of Public Safety. Accordingly, I must answer your question in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Government Center Commission should not issue a certificate stating that the Architect has fully completed all of the services required by his contract when it appears that such Architect never properly completed the services which would entitle him to the certificate.

JUNE 20, 1966.

HON. EDWARD H. ROEMER, *Chairman, Government Center Commission.*

DEAR MR. ROEMER:—In a request for an opinion, you attach a copy of a contract between the Commonwealth of Massachusetts (acting through the Commission) and Emery Roth and Sons, an architectural firm in New York City. Section 6 of this contract, which was for the design of a state office building, provides for payment to the architect in stages. According to this section, payment No. 6 shall be:

"5% of the difference between the amount of the Estimated Contract Fee and the amount of payment No. 5, above, upon issuance by the Commission of its Certificate stating that the Architect has fully completed all of the services required by this Contract, other than the services specified in subdivisions (j) and (k) of Section 4."

I mention other relevant facts stated in your request. All payments up to (but not including) payment No. 6 have been made to the architect. Payment No. 6 is the penultimate payment called for by the contract; this payment, if made, would be in the sum of approximately \$30,000. Since the final obligation (No. 7) calls for payment of approximately \$35,000, the Commonwealth, if and when it has received full performance of the architect's obligations under the contract, will owe the architect about \$65,000.

You state in your letter:

"During the course of construction certain questions have arisen concerning the adequacies of various aspects of the design. Some of these matters, including the failure of the Architect to include in the specifications hose bibbs and floor drains as required by the State Plumbing Board regulations, have resulted in change orders issued to the contractor. These change orders have involved in some cases substantial extra cost to the Commission."

In view of these facts, you ask:

"Is the Commission required to make payment to the Architect in accordance with payment No. 6 under schedule of payments if such payment should reduce the amounts owing to the Architect for professional services to the extent that the Commission could not deduct from the fees due the Architect the amount of its damages incurred as a result of errors or omissions of said Architect?"

As you state, the making of payment No. 6 "is conditioned on the issuance" of a certificate stating that "the Architect has fully completed all of the services required by this contract [except for certain services which do not appear to be relevant to this opinion]." From the statements in your letter which I have already quoted, it appears that

the architect never properly completed the services whose completion would entitle it to the certificate contemplated by section No. 6 of the contract and, by virtue of the issuance of such certificate, to payment No. 6. (I assume that a proper interpretation of the contract required the architect "to include in the specifications hose bibbs and floor drains as required by State Plumbing Board regulations.")

In these circumstances, the certificate should not be issued. *Dolben v. Kaufman*, 270 Mass. 381, 384-385. *Quincy Trust Co. v. Pembroke*, 346 Mass. 730, 732. I do not reach the question of whether upon issuance of the certificate you may withhold from the architect such funds as you believe would be owing to the Commonwealth because of a breach of contract by the architect.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

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The action of the Commissioner of Public Works, in requesting the reinstatement of an employee who had been suspended under the so-called Perry Law, does not, in and of itself, constitute a termination of the suspension of such employee.

The Civil Service Commission does not have the authority to overrule the decision of the Director of Civil Service in refusing to reinstate the employee, and order the Director to reinstate him.

JUNE 20, 1966.

HON. HUGH MORTON, *Chairman, Civil Service Commission*.

DEAR MR. MORTON:—You have requested an opinion with respect to the reinstatement of a civil service employee suspended under the provisions of G. L. c. 30, § 59, as amended, the so-called Perry Law. The relevant facts are contained in your request. Notice of his suspension under c. 30, § 59 was given the employee in question on October 30, 1964, by means of a letter signed by the Commissioner of Public Works. The employee had been indicted by a grand jury in Barnstable County on April 10, 1964. Subsequent to the effective date of the suspension, the employee was convicted and sentenced to pay a fine of \$500; this fine has since been paid.

On November 16, 1965, the Commissioner of Public Works requested the Director of the Division of Civil Service to reinstate the employee, assigning as a reason for such reinstatement the fact that the employee's suspension had terminated. The Commissioner's request was approved by the Director of Personnel and Standardization on November 17, 1965, the Director noting "expiration of period of suspension" as the ground for the approval. After a hearing held on December 20, 1965, the Director of the Division of Civil Service denied the Commissioner's request for reinstatement of the employee. The employee has appealed to the Civil Service Commission from the denial of reinstatement by the Director of the Division of Civil Service.

In light of the above facts, you have posed the following questions:

“Does the action of the Commissioner of Public Works, in requesting the reinstatement of the employee, constitute of itself a termination of the employee’s suspension, without any formal votes or action by the Commission to that effect?”

“If your answer to this question is in the negative, does the Civil Service Commission have the authority to overrule the decision of the Director of Civil Service in refusing to reinstate the employee, and order the Director to reinstate him?”

General Laws c. 30, § 59, contains a specific provision with respect to the method by which suspensions are to be imposed or removed.

“. . . Notice of said suspension shall be given in writing and delivered in hand to said person or his attorney, or sent by registered mail to said person at his residence, his place of business, or the office or place of employment from which he is being suspended. Such notice so given and delivered or sent shall automatically suspend the authority of said person to perform the duties of his office or employment *until he is notified in like manner that his suspension is removed.* . . .” [Emphasis supplied.]

The statute further provides that a given suspension is to come to an end if the criminal proceedings against the person suspended “are terminated without a finding or verdict of guilty on any of the charges on which he was indicted.” A suspension would likewise terminate upon the death, resignation, removal or expiration of the term of a given appointee. See *Caples v. Secretary of the Commonwealth*, 1966 Mass. Adv. Sh. 695, 697. However, should none of these conditions occur, and should a given appointing authority desire to restore an employee suspended under the Perry Law, it is clear that termination of the suspension must be effected in accordance with the provisions of c. 30, § 59 which are quoted above.

The statute provides that a suspension shall take effect upon the delivery in hand or the sending by registered mail of written notice to the employee in question. The sending of such notice automatically suspends the right of the employee to perform the duties of his position “until he is notified *in like manner* that his suspension is removed.” [Emphasis supplied.] Thus, termination of a suspension under the circumstances described in your letter requires the delivery in hand or the sending by registered mail of a notice of termination. The manner of effecting termination described in your request would not be sufficient.

Once the Commissioner has indicated to the employee that the suspension is to be terminated, reinstatement should proceed in accordance with the provisions of G. L. c. 31, § 46C. That section establishes procedures for reinstatement of civil service employees who have been separated in any way from the official or labor service.

“An officer or employee of the commonwealth or of any city or town who has been separated from the official or labor service may, upon the request of the appointing authority and with the approval of the

director, be reinstated in the same or in another department in a position in the same class and grade or in a lower grade in the same class. . . .”

I am aware that the Supreme Judicial Court has held that the suspension provisions of the Perry Law supersede the notice and hearing requirements of the Civil Service statutes.

Bessette v. Commissioner of Public Works.

348 Mass. 605, 608

This holding, however, would appear to relate only to the method by which a particular suspension is to be effected. I find nothing which compels the conclusion that the entire Civil Service statute becomes inoperative simply because the Perry Law has been applied in a given case. A suspension under the provisions of c. 30, § 59 represents as complete a separation from the official or labor service as could be imposed by a suspension under c. 31, § 43. Nothing indicates that the provisions of c. 31, § 46C, obviously applicable to reinstatements after c. 31 suspensions, should not be applicable to reinstatements after Perry Law suspensions as well.

Perhaps the more crucial question which must be resolved in answering your first inquiry is whether the employee in question can be reinstated at all. It is my opinion that a given appointing authority may, in his discretion, seek the restoration of a person suspended under c. 30, § 59, although he clearly cannot be compelled to do so. The Perry Law is not a removal statute. It is a law which is concerned primarily with the period during which a given appointee is under indictment. It would appear that even after conviction a person suspended under the Perry Law would be entitled to the protection of normal removal proceedings before he could be discharged. The language of c. 30, § 59 does not in any way support the conclusion that conviction effects an automatic removal.

Nor is there anything in the statute which implies that conviction destroys any possibility of reinstatement. Language used by the Supreme Judicial Court in the *Bessette* opinion cited above does not compel such a conclusion. The Court stated, at page 609:

“ . . . No argument is needed to show that it is appropriate, and in the public interest, that an official indicted for malfeasance in office should be separated from the office pending trial and, if convicted, *should have no right of reinstatement. . . .*” [Emphasis supplied.]

It is my opinion that the Court has indicated only that such an employee may not demand reinstatement after he has been convicted. I find nothing in the Court's language which indicates in any way that the appointing authority may not exercise discretion—subject to c. 31, § 46C—to restore such an employee. To construe the Court's language in such a way as to imply that the employee could not be reinstated in any event would be arbitrarily to add to the statute an element not expressly included by the Massachusetts Legislature.

Accordingly, it is my opinion that the action of the Commissioner of Public Works described in your letter does not in and of itself constitute

a termination of the suspension of the employee in question. It follows that the answer to your second question must also be in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Board of Registration in Veterinary Medicine need not investigate matters which consist exclusively of contractual disputes between two veterinarians. However, the Board is compelled to investigate all complaints of the violation of any provision of G. L. c. 112, § 59, and, if in doing so, it decided to investigate and hear complaints of the violation of the provisions of § 61 of said chapter, it would not be acting in excess of its authority.

JUNE 21, 1966.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MRS. SULLIVAN:—In a recent request for an opinion, you asked whether the Board of Registration in Veterinary Medicine may consider a problem which originated as a private matter between two veterinarians, but which has elements which might fall within the jurisdiction of the Board. Your letter mentioned that Veterinarian "A" has lodged a complaint with the Board against Veterinarian "B" based upon an alleged breach of a hospital and practice sale contract. You have provided me with a copy of the letter of complaint, in which Doctor "A" also charged Doctor "B" with deceit, misconduct, false or misleading advertising and conduct unbecoming to the veterinary profession.

The last two paragraphs of your request state:

"Dr. ["A"] is of the opinion he has been legally wronged by Dr. ["B"], as explained in his letter. Dr. ["A"] further feels that such violation comes to some degree under the Veterinary Medicine Laws. Such paragraphs as he mentions are the basis for his opinion.

"There is question in the mind of the Board if such contractual violation does come under the law as mentioned. This Board would like an opinion on this before taking any further action in the case."

The question expressed in your last paragraph contains two aspects: (1) must the Board investigate the alleged breach of contract, and (2) how, if at all, should the Board consider complaints of Doctor "A" other than those specifically consisting of the suggested breach of contract?

There are three sections in G. L. c. 112 which provide guidelines for Board action in this type of situation:

General Laws c. 112, § 59 provides in part:

"By vote of four members the board may, for any cause set forth in this section, revoke or suspend for a certain time the license of any person to practice veterinary medicine in this commonwealth after notice and hearings.

"Causes for which the board may revoke or suspend a license are as follows:

(a) The employment of fraud, misrepresentation or deception in obtaining such license.

(b) Conviction of a crime involving moral turpitude or conviction of a felony, in which case the record of such conviction shall be conclusive evidence.

(c) Chronic inebriety or habitual use of drugs.

(d) For having professional connection with or lending the use of his name to any illegal practitioner of veterinary medicine and the various branches thereof.

(e) Conviction of a violation of the Harrison Act, regulating narcotics, or a settlement of a tax liability in connection with such violation, in which case the record of such conviction or settlement, as the case may be, shall be conclusive evidence.

(f) Fraud or dishonesty in applying or reporting tuberculin or other biological tests.

(g) False or misleading advertising having for its purpose or intent deception or fraud.

(h) Conduct reflecting unfavorably on the profession of veterinary medicine.

(i) Court conviction on a charge of cruelty to animals.

(j) Failure of a registered veterinarian to keep his office or hospital and equipment therein in a clean and sanitary condition."

General Laws c. 112, § 57 states:

"The board shall keep a register of all veterinarians registered by it, which shall be open to public inspection, and shall make an annual report. It shall investigate all complaints of the violation of any provision of section fifty-nine and of section sixty-five, so far as it relates to veterinary medicine, and report the same to the proper prosecuting officers."

And G. L. c. 112, § 61 includes the following:

"Except as otherwise provided by law, each board of registration or examination in the division of registration of the department of civil service and registration, after a hearing, may, by a majority vote of the whole board, suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the board that the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practice of his profession, or of any offence against the laws of the commonwealth relating thereto. Any person whose certificate, registration, license or authority is suspended or revoked hereunder shall also be liable to such other punishment as may be provided by law. The said boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings."

It is my opinion that an alleged breach of contract between two

veterinarians would not ordinarily come within the scope of problems to be investigated by the Board. In the foregoing sections, no mention is made of breach of contract as a ground for license suspension or revocation. As a legal concept, a contract involves rights and duties running solely between the parties to the contract. Such private rights do not generally affect the public interest, which interest is the prime concern of the Board of Registration in Veterinary Medicine. Therefore, the Board need not investigate matters which consist exclusively of contractual disputes between two veterinarians. However, it should be noted that a situation involving a breach of contract may well contain elements which, individually, would come within the definitions of G. L. c. 112, §§ 59 or 61. Investigation of these factors should be made as described below.

General Laws c. 112, § 57 requires the Board to "investigate all complaints of the violation of any provision of section fifty-nine. . . ." The letter of Doctor "A" states a complaint under § 59 (h) and poses charges which fall within the scope of § 59(g). The fact that the charges are made by one member of a profession against another practitioner of the same profession is entirely irrelevant. If the charges are substantiated and if they bear a criminal penalty, they should be reported to the "proper prosecuting officers."

General Laws c. 112, §§ 59 and 61 both specify grounds for revocation or suspension of the license of a veterinarian. Doctor "A"'s letter also contains allegations which, if proved, would fall within the purview of § 61. While there is no statutory command that § 61 complaints be formally investigated, obviously some consideration of the facts would be necessary prior to the holding of a hearing before the Board. Investigations under §§ 59 and 61 may be made pursuant to regulations promulgated by the Board under the authority of G. L. c. 112, §§ 54 and 61.

It is my opinion, therefore, that the Board is compelled to consider the § 59 charges made by Doctor "A". Investigation of § 61 charges is discretionary with the Board. Inasmuch as the law requires the Board to investigate the § 59 complaints, the Board would not exceed its authority if, in its discretion, it decided to investigate and hear the § 61 charges at the same time as those which relate to § 59.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

As a result of the enactment of St. 1965, c. 726, the eligibility of certain veterans for the benefits provided by St. 1941, c. 708, as amended by St. 1964, c. 580, the Legislature restored many of the benefits which it had taken away in its previous session. All service rendered prior to July 1, 1964, whether voluntary or involuntary, may be counted for purposes of reinstatement and retirement. Involuntary service may still be counted even after July 1, 1964, assuming that the serviceman in question had accumulated no more than four years of voluntary service during his entire military service. However, a serviceman who has already contributed four years of voluntary service prior to July 1, 1964, must file an application for reinstatement on or before July 1, 1966.

JUNE 30, 1966.

HON. W. HENRY FINNEGAN, *Director of Civil Service.*

DEAR SIR:—You have requested my opinion with respect to the legal effect of c. 726 of the Acts of 1965 upon the eligibility of certain veterans for the benefits provided by c. 708 of the Acts of 1941, as amended by c. 580 of the Acts of 1964. You have posed the following factual situation and related questions:

“A permanent employee has been in the military service for four years prior to July 1, 1964 on a voluntary basis and is continuing to serve on a voluntary basis after July 1, 1964. His last enlistment would extend for a period in excess of four years after July 1, 1964 on a voluntary basis. I, therefore, request your opinion (1) as to whether or not the fact that the employee had served on a voluntary basis in excess of four years prior to July 1, 1964 and continues to serve on a voluntary basis up to a period of four years after July 1, 1964, and requests reinstatement under Chapter 708, Acts of 1941, as amended, entitles him to reinstatement to his former position under the provisions of Chapter 708, Acts of 1941, as amended or (2) is it your opinion that a permanent employee who has served more than four years on a voluntary basis prior to July 1, 1964 and continues to serve on a voluntary basis subsequent thereto is entitled to reinstatement and all the benefits set forth therein, if he requests reinstatement within two years after July 1, 1964.”

Before proceeding to your specific inquiries, it may be of some assistance to review the relevant provisions of c. 708 of the Acts of 1941, as well as the amendments to that statute enacted by the General Court in 1964 and 1965. St. 1941, c. 708 is entitled, AN ACT TO MEET CERTAIN CONTINGENCIES ARISING IN CONNECTION WITH THE SERVICE OF PUBLIC OFFICERS AND EMPLOYEES AND CERTAIN OTHER PERSONS IN THE MILITARY OR NAVAL FORCES OF THE UNITED STATES DURING THE PRESENT NATIONAL EMERGENCY. Section 1 of this law provided as follows:

“Any person who, on or after January first, nineteen hundred and forty, shall have tendered his resignation from an office or position in the service of the commonwealth, or any political subdivision thereof, or otherwise terminated such service, for the purpose of serving in the

military or naval forces of the United States and who does or did so serve or was or shall be rejected for such service, shall, except as hereinafter provided, be deemed to be or to have been on leave of absence; and no such person shall be deemed to have resigned from his office in the service of the commonwealth, or any political subdivision thereof, or to have terminated such service, until the expiration of one year from the termination of said military or naval service by him."

In other sections of c. 708, the Legislature similarly protected retirement rights of such servicemen. By c. 4 of the Acts of 1947, the Legislature extended from one year to two years from termination of service the time within which a claim for reinstatement would have to be made.

In St. 1941, c. 708, military service was defined as service "occurring on or after July first, nineteen hundred and forty and prior to January first, nineteen hundred and forty-four." (§ 25.) In succeeding years, up to and including 1962, the General Court has amended § 25 to extend the period of time which could be counted as creditable service. (See St. 1962, c. 544.) Accordingly, prior to 1964, voluntary as well as involuntary service entitled a veteran to the reinstatement and retirement benefits of c. 708 of the Acts of 1941.

In 1964, the General Court altered the definition of military service for the purpose of the application of St. 1941, c. 708. Section 25 of the said c. 708 was amended to read as follows:

"Service in the military or naval forces of the United States referred to in this act shall, except as otherwise provided thereby, mean such service occurring between January first, nineteen hundred and forty and July first, nineteen hundred and sixty-six; *provided, however, that such service shall not be construed to include service for more than four years unless such further period of service in excess of four years was involuntary service required by the government of the United States.*" [Emphasis supplied.]

This change, effective on July 1, 1964, clearly had the effect of eliminating large numbers of servicemen who had remained in the military on a voluntary basis from any possibility of qualifying for the benefits provided by c. 708 of the Acts of 1941. See *Opinion of the Attorney General*, dated February 26, 1965, which discusses the effects of St. 1964, c. 580.

In 1965, the Legislature changed the definition of military service again. Section 1 of c. 726 of the Acts of 1965 amended § 25 of c. 708 of the Acts of 1941 so that § 25 read as follows:

"Service in the military or naval forces of the United States referred to in this act shall, except as otherwise provided thereby mean such service occurring between January first, nineteen hundred and forty and July first, nineteen hundred and sixty-six; *provided, however, that such service shall not be construed to include service for more than four years unless such further period of service in excess of four years was involuntary service required by the government of the United States or unless such service in excess of four years was rendered prior to July first, nineteen hundred and sixty-four.*" [Emphasis supplied.]

Thus, by indicating that all types of service rendered prior to July 1, 1964 could lawfully be considered for credit under St. 1941, c. 708, the Legislature restored many of the rights which it had taken away in its previous session. The provisions of c. 726 of the Acts of 1965 took effect on July 1, 1964. Consequently, as a result of the passage of St. 1965, c. 726, the situation with respect to receipt of the benefits of St. 1941, c. 708 is as follows: All service rendered prior to July 1, 1964, whether voluntary or involuntary, may be counted for purposes of reinstatement and retirement. Involuntary service may still be counted even after July 1, 1964, assuming that the serviceman in question has accumulated no more than four years of voluntary service during his entire military career.

An issue which remains for consideration relates to the time by which a given serviceman must apply for reinstatement. Section 1 of c. 708 of the Acts of 1941, as amended, indicates that such application must be filed within two years "from the termination of said military or naval service by him." Likewise, G. L. c. 32, § 4(1)(h) indicates that the retirement rights of such a serviceman shall be protected if he is "reinstated or re-employed in his former position or in a similar position within two years of his discharge or release from such service." It is my opinion that the phrases "termination of said . . . service" and "discharge or release from such service" must be interpreted in the light of the definition of military service contained in St. 1941, c. 708, § 25, as amended. I do not believe that the Legislature intended that governmental employees be allowed voluntarily to remain in the service for an unlimited period of time, and then have an additional two years from the final termination of service in which to claim statutory benefits (albeit such benefits might well be calculated solely on the basis of service given prior to July 1, 1964). Rather, it would appear that the Legislature intended the two-year period in which application for reinstatement must be made to begin at the date of termination of that period of service which may be counted as creditable service for the purpose of receipt of the benefits provided by St. 1941, c. 708. Accordingly, a serviceman who—pursuant to St. 1965, c. 726—may count service only up to July 1, 1964 for reinstatement and retirement purposes must file an application for reinstatement on or before July 1, 1966.

The statutes should be applied to your specific questions in the manner described above. The serviceman described in your first question has already contributed four years of voluntary service prior to July 1, 1964. He must then file an application for reinstatement on or before July 1, 1966. Should he be unable to do so, because of a remaining service obligation or for any other reason, he will not be entitled to the benefits of c. 708 of the Acts of 1941. The two-year period in which to apply for reinstatement must be calculated upon the date of termination of service as service is defined by the statute (in this case, July 1, 1964). The two-year period is not to be calculated from the date of his ultimate discharge or release. Accordingly, I answer your first question in the negative. On the other hand, the hypothetical serviceman described in your second question will have applied for reinstatement within two years of the termination of his service as defined by the statute, and

accordingly will be entitled to all of the benefits provided for him by c. 708 of the Acts of 1941. Therefore, my answer to your second inquiry is in the affirmative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The word "grade" as used in St. 1965, c. 785 refers to the list of pay grades established in Rule 16.1 (Rules and Regulations for the Government of the Massachusetts State Police [uniformed branch]).

Section 9-0, paragraph 2, is intended to require that there be two performance evaluation reports for each member of the state police whose performance must be rated. The term "first line supervisor" refers to the officer who bears immediate responsibility for the work of the individual whose performance is being evaluated. The second report is intended to reflect the opinion and judgment of the officer who has had opportunity to observe the day-to-day performance of the person involved.

The longevity rating may not be pro-rated on a monthly basis. Longevity should be determined as of the date when a promotion list is to be published.

The "general average mark" is to be expressed as a percentage, and the two-point preference for veterans means two additional percentage points.

Chapter 785 does not require that those officers who are holding temporary ranks shall be considered the permanent rank assigned to the same pay grade. However, the statute plainly does require that officers holding temporary ranks shall have the same right to compete for promotion as they would if they held their ranks on a permanent basis.

Members covered by § 4 of c. 785 may, without spending any time in the next subordinate grade, take a competitive promotional examination for the next higher-grade only.

The Commissioner of Public Safety may not make promotions to the grade of Staff Captain and Civil Defense and Staff Captain and Supply Officer.

JUNE 30, 1966.

HON. LEO L. LAUGHLIN, *Commissioner of Public Safety*.

DEAR SIR:—I have received your request for my opinion concerning c. 785 of the Acts of 1965, entitled "An Act Establishing the Procedure for Promotions Within the Uniformed Branch of the Division of State Police in the Department of Public Safety." Since your request includes a number of separate questions, I shall consider each matter individually.

"1. Do the words 'next subordinate grade' and 'next two subordinate

grades' as used in section nine O (1) and section nine P refer to the order of ranks as published in Rule 4.1 of the Rules and Regulations for the Government of the Massachusetts State Police (Uniformed Branch), copy attached, or to the order of pay grades as published in the same Rule and in the pay plan for the Uniformed Branch of the Division of State Police as published in Rule 16.1 of the same Rules and Regulations?"

It is my opinion that the word "grade" as used in c. 785 of the Acts of 1965 refers to the list of pay grades established in Rule 16.1 rather than the list of ranks set forth in Rule 4.1. It is self-evident that in several instances a group of two or more of the ranks appearing on the list contained in Rule 4.1 are of approximately equal standing. Surely the General Court did not intend the detailed procedure established by c. 785 to be applied to "promotions" which involve only a change of title and duties without a corresponding change in compensation. If the list set forth in Rule 4.1 were to be applied literally the rate of promotion would be agonizingly slow in view of the requirement of the new section nine O of chapter 22 that promotion lists "shall remain valid for a period of two years from the date of publication."

For example, if a "Sergeant" in job group 14 were promoted to "Detective Sergeant" in job group 15, he would have to wait at the very least through a period of five years and three "promotions" before reaching job grade 16 with a rank of "Lieutenant." The Legislature clearly did not intend that the nearly equal ranks of "Detective Sergeant," "Technical Sergeant" and "Staff Sergeant" should constitute different "grades" for purposes of promotion under the provisions of c. 785. It should also be noted that if the list in Rule 4.1 is used as a basis for promotion, the only state police officers who will be eligible for promotion to the rank of "Special Officer Sergeant" will be those holding the rank of "policewoman." Such a result militates against an interpretation which would require it.

I further note that according to your own long-standing regulations, promotion is defined as a "change from duties of one rank to the duties of a higher rank, *which shall involve a change in salary to the rates of a higher rank.*" [Emphasis supplied.] Rule 16.1 of the Rules and Regulations for the Government of the Massachusetts State Police (Uniformed Branch). I assume that the General Court was aware of this when it enacted St. 1965, c. 785. See *Tyler v. Treasurer & Receiver General*, 226 Mass. 306, 310.

"2. Who in the Uniformed Branch of the Division of State Police is to be considered a 'first line supervisor' as referred to in section nine O (2)? The first commanding officer of the troopers is the substation commander. Is the substation commander considered to be the 'first line supervisor' as referred to in section nine O (2)?"

The new section nine O of c. 22 requires in paragraph (2) that members of the state police shall be rated annually by means of "performance evaluation reports." These reports are to be submitted by "each troop commanding officer or bureau head and first line supervisor."

It is my opinion that paragraph (2) is intended to require that there be two "performance evaluation reports" for each member of the state police whose performance must be rated. One report is clearly required to be made by the troop commanding officer or bureau head. As to the other report, it is my opinion that the term "first line supervisor" refers to the officer who bears immediate responsibility for the work of the individual whose performance is being evaluated. This second report is intended to reflect the opinion and judgment of the officer who has had the opportunity to observe the day-to-day performance of the person involved.

Since the ranks and duties of different members of the state police vary widely, the designation "first line supervisor" must similarly reflect the substantial number of different positions occupied by individuals who are seeking promotion. It is therefore my opinion that the Commissioner of Public Safety must determine in his reasonable discretion who will be considered the "first line supervisor" in each of the different situations where a performance evaluation report must be prepared. If the substation commander is the most logical person to evaluate the day-to-day performance of the troopers under his command, then the Commissioner of Public Safety may properly designate him as the "first line supervisor" for that purpose.

"3. Section nine O (4) states ' . . . a determination of longevity based upon the granting of five per cent for each year, or major part thereof up to twenty years of service.' Does this mean that the longevity has to be pro-rated on a monthly basis or does it mean that a man with less than seven months is to be considered, for these purposes, to have completed his last 'full' year and the man with more than six months to have completed the next 'full' year? What is the final date for compiling this longevity?"

It is my opinion that the longevity rating may not be pro-rated on a monthly basis. A member of the state police should receive a longevity rating of 5% for each full year plus an additional 5% if he has been in the service for more than six months beyond the number of full years. By requiring that credit be given "for each year, or major part thereof" the Legislature clearly intended that portions of a year should not be pro-rated, but rather that a man should receive either a full year's credit or no credit at all, depending on whether his particular fractional part of a year of service does or does not exceed six months.

In answer to the second part of your question, it is my opinion that longevity should be determined as of the date when a promotion list is to be published. There is nothing contained in c. 785 which would suggest any other date, and the use of a different date would be arbitrary and unnecessary.

"4. Paragraph nine of section nine O states: 'Each candidate for promotion to any such grade who is a veteran shall have two points added to his general average mark.' Are these points hard points similar to those mentioned in the two preceding paragraphs of the legislation or are these two points to be converted to a percentage value of the general average mark attained by a candidate for promotion?"

The new section nine O of c. 22 provides in its second sentence that:

"All promotions shall be based on the following factors which shall be marked on a percentage basis."

By this provision the General Court intended that each candidate for promotion would receive a percentage mark on each of the factors enumerated in section nine O. These individual percentage marks would then be combined into a "general average mark" which would be computed in accordance with the various weights assigned to each factor by the further provisions of section nine O. It is my opinion that the General Court intended this "general average mark" to be expressed as a percentage, and that therefore the two-point preference for veterans was intended to mean two additional percentage points, not two "hard" points.

"5. Section three states: ' . . . provided, however, that persons occupying temporary positions on said effective date shall be authorized to continue in such positions and shall, for the purpose of promotion, be deemed to hold the rank to which they have been temporarily promoted.'

(A) Does this mean that as of the effective date of this legislation those officers who are holding temporary ranks shall be considered to hold the permanent rank assigned to the same pay grade?

(B) Does this mean that persons occupying temporary positions on the effective date of the legislation and who meet the requirements for promotion as set forth elsewhere in the legislation are deemed eligible to compete for promotion to the next higher pay grade?

(C) If the answer to A or B is yes, is the effective date of the rank being held by these persons the effective date of this legislation or the date they were promoted to the temporary rank?"

Although the quoted portion of section three of c. 785 admittedly grants certain new rights to "persons occupying temporary positions," such new rights relate solely to *eligibility* for promotion. It is therefore my opinion that c. 785 does not require that those officers who are holding temporary ranks shall be considered to hold the permanent rank assigned to the same pay grade. On the other hand, the statute plainly does require that officers holding temporary ranks shall have the same right to compete for promotion as they would if they held their ranks on a permanent basis.

Since for purposes of promotion it is the clear intent of section three of c. 785 to place officers holding temporary ranks on the same standing as those holding permanent ranks, the date as of which a man holds a temporary rank ought to be computed in the same fashion as if he held the rank on a permanent basis, *i.e.*, from the original date of promotion.

"6. Section four states: 'Notwithstanding the provisions of section nine O of chapter twenty-two of the General Laws, inserted by section two of this act, any member of the uniformed branch of the division of state police who on the effective date of this act has completed ten years of service as such member may take a competitive promotional examination without being required to complete one year of service in the next

subordinate grade prior to the final date for filing the application for such examination.'

(A) Does this mean that members of the Uniformed Branch with ten years of service on the effective date may take the examination for any grade without spending any time in the next subordinate grade?

(B) If so, am I required to place said member on the list of members of the Uniformed Branch of the Division of State Police who are eligible for promotion to said grade?"

It is the manifest intention of section four of c. 785 to provide a special advantage for those members of the state police having ten or more years of service on the effective date of c. 785 by in effect waiving the requirement that they must have served not less than one year in the next subordinate grade before being eligible for promotion. In dispensing with the requirement that a candidate for promotion must complete one year in the next subordinate grade, the General Court did not enact any proviso demanding that such candidate spend any time in such grade. There is no reason to believe that such an omission was unintentional on the part of the Legislature.

Admittedly, there is nothing in § 4 which specifically provides that a given member of the state police be restricted to the taking of a competitive promotional examination for the next grade only. However, it is my opinion that this requirement is implied in the statute. I do not believe that the Legislature intended to reward the completion of ten years of service by opening *any* grade to a given member providing he passes the required examination. Had the General Court intended such an unusual provision, it is fair to expect that it would have included very specific reference thereto. Accordingly, it is my opinion that members covered by § 4 of c. 785 may—without spending any time in the next subordinate grade—take a competitive promotional examination for the next higher grade only.

"7. In determining 'longevity' and 'service' as used in section nine O (4), section nine Q, and section four, is the time a member of the Uniformed Branch served at the State Police Academy as a State Police Trainee to be included? Normally, we consider a man to be enlisted as a member of the Uniformed Branch of the Division of State Police as of the date he is enlisted by oath. For your information and possible assistance, a man may complete his training period and not actually enter on duty for some time (as long as one year) because a vacancy does not exist. Further, a trainee is paid one salary step less than an enlisted trooper."

By making "longevity" a factor in the promotion system for members of the state police, the Legislature intended that promotions should to some extent depend on the amount of knowledge and practical experience which a man may have gained in the course of performing his duties as a state police officer. Since a man is not gaining this sort of knowledge and practical experience during the time he is waiting to be appointed as a trooper, it would appear that this period does not constitute regular

service in the state police for purposes of computing longevity. I am not sufficiently acquainted with the program at the State Police Academy to determine whether a person in attendance there receives knowledge and practical experience somewhat equivalent to that which would be gained in the performance of regular police duties. I am therefore unable to give a definitive answer to your question. It appears that the question which you raise is one which—in the first instance—you might resolve as the officer charged with the administration of the statute. See *Cleary v. Cardullo's Inc.*, 347 Mass. 337, 350.

"8. Section nine P provides that any vacancy that occurs in the grade of Lieutenant Colonel and Executive Officer shall be filled by the next two subordinate grades and any vacancy that occurs in the grade of Major and Adjutant from the next subordinate grade. The ranks and grades in the Uniformed Branch State Police are as follows:

Colonel

Lieutenant Colonel and Executive Officer

Major and Adjutant

Staff Captain and Civil Defense Officer

Staff Captain and Division Inspector

Staff Captain and Supply Officer

All Staff Captains are in the same pay grade, that is, Group 18. These are referred to in Rule 4.1 and Rule 5.6. In a vacancy of Lieutenant Colonel, are the next two subordinate grades Major and Adjutant and Staff Captain and Civil Defense Officer, or are the next two subordinate grades Major and Adjutant and all Staff Captains?"

In my answer to your first question, I determined that the "grades" referred to in c. 785 are the grades of pay as set forth in Rule 16.1 of the Rules and Regulations of the Massachusetts State Police. Accordingly, it is my opinion that the three different ranks of Staff Captain constitute a single "grade" for the purposes of G. L. c. 22, § 9P as added by c. 785. Therefore, all Staff Captains shall be eligible for promotion to the ranks of "Lieutenant Colonel" and "Major and Adjutant."

"9. Section nine provides: The Commissioner may promote members of the Uniformed Branch State Police who are eligible for promotion to the grade of non-commissioned officer, Lieutenant, Captain, Staff Captain and Division Inspector. The section does not provide for the grade of Staff Captain and Civil Defense Officer or Staff Captain and Supply Officer. Under the law, may I make promotions to the grade of Staff Captain and Civil Defense and Staff Captain and Supply Officer?"

As noted in question 8, there are three ranks of Staff Captain in the Uniformed Branch: Staff Captain and Civil Defense Officer, Staff Captain and Division Inspector, and Staff Captain and Supply Officer. The explicit mention of Staff Captain and Division Inspector as a rank to which the Commissioner may promote members of the Uniformed Branch and the failure to mention the two other types of Staff Captains may not be deemed to be unintentional. *Expressio unius est exclusio*

alterius. Iannelle v. Fire Comm. of Boston, 331 Mass. 250, 252 and cases cited. I answer your ninth question in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

The Service Corps is not one of the twenty departments authorized by Article 56 of the Massachusetts Constitution, or a division in such a department and G. L. c. 30, § 6 is not applicable to the Corps. C. 622 of the Acts of 1964 does not establish a position of acting director of the Service Corps.

JUNE 30, 1966.

HON. JOHN C. CORT, *Director, Service Corps*.

DEAR MR. CORT:—In a recent request for an opinion, you have referred to the amendment of c. 30, § 6 by St. 1965, c. 655, and asked who should appoint the acting director of the Service Corps, which you have described as “this department.” You have questioned the apparent interaction of c. 30, § 6 and c. 622 of the Acts of 1964, which chapter created the Service Corps Commission and the Service Corps.

Chapter 30, § 6 is entitled “Absence or Disability of Department Heads.” The first few phrases of this section, which define the persons with whom the statute is concerned, read:

“If during the absence or disability of a commissioner or head of an executive or administrative department or of a director or head of a division in a department. . . .”

You will note that in all cases the absent or disabled individual must be one serving in a state department.

Section 1 of c. 30 is labeled “‘Departments,’ defined,” and states:

“The word ‘departments’, as used in this chapter, except in section two, shall, unless the context otherwise requires, mean all the departments of the commonwealth, except the departments of banking and insurance and of civil service and registration but including in lieu thereof the divisions of banks and loan agencies, of insurance, of savings bank life insurance and of civil service and the several boards serving in the division of registration of the department of civil service and registration, and also including the metropolitan district commission and the commissioner of administration.”

By statute, the only commission which is included as a state department is the Metropolitan District Commission. The Commonwealth Service Corps was never intended to be considered as a state department, and such a conclusion cannot be implied from the statute.

“It is a familiar principle of statutory interpretation that the express mention of one matter excludes by implication all other matters not mentioned.”

County of Bristol v. Secy. of the Commonwealth,
324 Mass. 403, 406

According to G. L. c. 30, § 3, divisions in state departments are created by the department head if he has authority to do so. There is nothing in c. 622 of the Acts of 1964 which tends to show that the Service Corps was created as a division in any department.

Accordingly, since the Service Corps is not one of the twenty departments authorized by Article 56 of the Massachusetts Constitution, or a division in such a department, it is my opinion that G. L. c. 30, § 6 is not applicable to the Corps. Nor does c. 622 of the Acts of 1964 establish a position of acting director of the Service Corps. For this reason, it is not necessary to consider by whom an acting director for the Service Corps would be appointed.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

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